United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT
LAKE BROADCASTERS, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

473

No. 17,595

LAKE BROADCASTERS, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal from Memorandum Opinion and Order
and Letter and Report and Order of
Federal Communications Commission

SAMUEL MILLER

MARK E. FIELDS

1032 Washington Building
Washington 5, D. C.

Attorneys for Appellant
Lake Broadcasters, Inc.

STATEMENT OF QUESTIONS PRESENTED

Counsel for Appellant and Appellee in this case entered into a stipulation approved by Order of this Court agreeing that the questions presented in this case are as follows:

1. Did the Commission act arbitrarily and capriciously, and did it deprive appellant of due process of law, when it returned appellant's application without a hearing as provided in Section 309 of the Communications Act?

2. Does the Commission's "freeze" rule, as applied here, violate the doctrine of Ashbacker Radio Corporation v. F.C.C., 326 U.S. 327, that a later application for a frequency in a particular city is entitled to comparative consideration with an earlier-filed one?

3. Was the Commission's refusal to consider appellant's application on its merits or to consider waiver of the "freeze" when requested, arbitrary and unreasonable in light of the Commission's continued consideration and granting of other applications?

4. Did the Commission commit error in not accepting appellant's application by reason of the Commission's omission to enunciate specific findings of fact and conclusions of law with respect to appellant's assertion that its application was entitled to comparative consideration with BP-15037?

INDEX

TABLE OF AUTHORITIES

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* Cases chiefly relied upon marked by asterisk.

Miscellaneous:

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BRIEF FOR APPELLANT LAKE BROADCASTERS, INC.

JURISDICTIONAL STATEMENT

Appellant, Lake Broadcasters, Inc., seeks reversal of three orders of the Federal Communications Commission (hereinafter referred to as Commission), the first released May 10, 1962 (FCC 62-516; R. 1-5, reported at 23 Pike & Fischer, R.R. 1545), the second a letter of October 10, 1962 (R. 31), and the third released January 11, 1963

(R. 40-44) which resulted in the return and effective denial of the application of Lake Broadcasters, Inc. for a new standard broadcast station at St. Ignace, Michigan, without consideration by the Commission.

This is an appeal from these orders under Section 402(b)(1) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 402(b), and Rule 37 of the Rules of this Court because Lake Broadcasters, Inc. is an ". . . applicant for a construction permit . . . whose application is denied by the Commission," in that, by refusing to accept the application and by returning such application without action, the Commission has effectively denied the application without the hearing required by Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 309. Appellant submits that this Court has jurisdiction fully to review and reverse the order of the Commission hereby appealed from under Section 402(b)(1), supra.

Appellant believes and avers that its appeal is properly within the jurisdiction of this Court under the decisions in Ranger v. F.C.C., 111 U.S. App. D.C. 44, 294 F.2d 240 (1961), and Ridge Radio Corp. v. F.C.C., 110 U.S. App. D.C. 277, 292 F.2d 770 (1961).

STATEMENT OF THE CASE

Sections 1.106(b)(1), 1.354(c) and 1.361(c) of the Commission's Rules, 47 C.F.R. Secs. 1.106(b)(1), 1.354(c) and 1.361(c), contain the provisions regulating the time of filing and the processing of standard broadcast applications at the Federal Communications Commission. Under Sec. 1.354(c), supra, the Commission provides that it will periodically publish in the Federal Register a public notice listing applications which are near the top of the processing line and announcing the date (not less than thirty days after publication) (1) on which the listed applications will be considered available and ready for processing and (2) by which all conflicting applications must be filed in order

to be grouped with any of the listed applications for processing. The date specified in these notices is known as the "cut-off date."

On August 14, 1961, Mighty-Mac Broadcasting Company filed its application for a new standard broadcast station on 940 kc, with power of 5 kilowatts, at St. Ignace, Michigan (R. 6). Under the Commission's procedures for processing standard broadcast applications, the application of Mighty-Mac Broadcasting Company was assigned File No. BP-15,037. It took its place in line for processing. In February 1962, before the Mighty-Mac application had reached the top of the line and been listed on any "cut-off" list, Lake Broadcasters, Inc., a Michigan corporation, was formed by persons interested in filing a competing application for the same frequency at St. Ignace. Unlike Mighty-Mac Broadcasting Company, whose principals all reside in or near Lansing, Michigan, which is located at a considerable distance from St. Ignace, Lake Broadcasters, Inc. included principals who are residents of the St. Ignace area (R. 7). As shown by Exhibit 1, attached to the application, the Articles of the corporation were prepared on February 15, 1962, and were filed with the State of Michigan Corporation and Securities Commission on February 19, 1962. The corporation was formed for the sole purpose of applying for a new standard broadcast station on 940 kc at St. Ignace. While the principals of Lake Broadcasters, Inc. were preparing necessary information for their AM application, on May 16, 1962, without any valid prior notice[1] or prior proceedings, the Commission, with Commissioner Hyde dissenting, adopted and released the first of the orders here complained of (R. 1-5) purporting to prohibit the filing of all standard broadcast applications for an indefinite period, beginning immediately, except in certain very limited circumstances not here present.

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[1] A Public Notice of the Commission released at approximately 3 p.m. on May 10th (Report No. 4188, Mimeo No. 20050) was the first notice had of the partial "freeze" on standard broadcast applications. Potential applicants thus had until the Commission's offices closed at 5:00 o'clock on that day to file complete applications.

The Order amended, without prior notice, Section 1.354 of the Rules by adding to it a Note which imposed the prohibition (see Appendix A hereto). The Order provided, however, that the Commission would continue to process and grant or designate for hearing applications for standard broadcast facilities then pending (R. 3, 5).

The application of Lake Broadcasters was, in fact, tendered for filing on July 31, 1962, together with a petition for acceptance of the application and waiver of the "freeze" order of May 10 (R. 6-7). Lake Broadcasters, Inc. proposes the use of the same frequency as Mighty-Mac in the same city, both applications being for daytime only operation. The Mighty-Mac application requests power of 5 kilowatts, whereas the application of Lake Broadcasters, Inc. is for only 1 kilowatt (R. 6, 33).

By letter dated October 10, 1962, mailed October 16, 1962 (R. 31), the Commission denied the petition filed by Lake Broadcasters, Inc. and returned its application as unacceptable for filing.

On November 2, 1962, the Commission released its "cut-off" list (F.C.C. 62-114), 27 Fed. Reg. 10862, listing the Mighty-Mac application (BP-15,037) as being available for processing on December 11, 1962 (R. 33). The Mighty-Mac application has not yet been granted and is still pending before the Commission.

On November 9, 1962, Lake Broadcasters, Inc. again tendered its application to the Commission, together with a petition requesting reconsideration of the Commission's previous action (R. 32-36). Mighty-Mac Broadcasting Company filed an opposition to the petition for reconsideration (R. 37-39). On January 9, 1963, the Commission adopted its Memorandum Opinion and Order denying the petition for reconsideration (R. 40-44). By letter mailed January 15, 1963, the Commission returned the application itself (R. 45).

Lake Broadcasters, Inc. thereupon filed a notice of appeal under Section 402(b) of the Communications Act of 1934, as amended, supra, on February 7, 1963.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 151, et seq., and the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. Sec. 1.1, et seq., are printed in the Appendix A to this brief (Pages A-1, et seq.).

STATEMENT OF POINTS

1. The Commission violated the unequivocal provisions of its Rules, and without prior notice, arbitrarily and capriciously adopted its Order of May 10, 1962, and by subsequent orders herein appealed from, based on the first unlawful Order, directed that the application of Lake Broadcasters, Inc. for a new standard broadcast station be returned without consideration.

2. The Commission, under all the circumstances before it, was arbitrary and capricious, assuming, arguendo, the validity of the amendment of its Rules by Order of May 10, 1962, in its refusal to waive the provisions of such rule with respect to the application of Lake Broadcasters, Inc.

SUMMARY OF ARGUMENT

Point I

In adopting the Order of May 10, 1962, here appealed from (R. 1-5) without any effective notice to anyone, the Commission arbitrarily and capriciously failed to comply with:

(1) The clear requirements of Sections 308 and 309 of the Communications Act of 1934, as amended, 47 U.S.C. Secs. 308, 309;

(2) Requirements of the Supreme Court decisions in Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945) and F.C.C. v. Allentown Broadcasting Co., 349 U.S. 358 (1955);

(3) The decision of this Court in Ridge Radio Corp. v. F.C.C., 110 U.S. App. D.C. 277, 292 F.2d 770 (1961);

(4) The unequivocal provisions of Secs. 1.106(b)(1), 1.354(c) and 1.361(c) of its own rules, 47 C.F.R. 1.106(b)(1), 1.354(c) and 1.361(c); and

(5) Its own unequivocal explanation of how it processes applications, WMAD, Inc., 23 Pike & Fischer, R.R. 469 (1962).

The Commission on May 10, 1962, adopted its Report and Order (R. 1-5) completely abolishing (with certain limited exceptions not here pertinent) the right of any party to file any applications after that day, despite the fact that numerous applications were in the process of preparation, on which many thousands of dollars had been invested in reliance upon the Commission's processing procedures, and particularly its "cut-off" procedure as laid out in its Rules (see previous paragraph). Such action without notice was patently contrary to the Commission's own rules, the Communications Act of 1934, as amended, and Court decisions. The Order of May 10, 1962, and subsequent orders reaffirming it, must be reversed.

Point II

Assuming, arguendo, that the amendment to the Rules adopted on May 10, 1962, was valid, the circumstances presented by the application of Lake Broadcasters, Inc. warranted a waiver thereof. The Commission was arbitrary and capricious and abused its discretion in failing to grant such waiver without even giving any specific reason therefor.

ARGUMENT

I

The Commission Violated the Provisions of Its Rules, and Without Prior Notice, Arbitrarily and Capriciously Adopted Its Order of May 10, 1962, and by Its Letter of October 10, 1962, Based on the First Unlawful Order, Directed That the Application of Lake Broadcasters, Inc. for a New Standard Broadcast Station be Returned Without Consideration

Lake Broadcasters, Inc. relied upon the provisions of the Commission's Rules, especially Sections 1.106(b)(1) and 1.354(c), in preparing its application, which was directly competitive with the earlier-filed application of Mighty-Mac Broadcasting Company. Of course, Lake Broadcasters, Inc. took the risk that the Mighty-Mac application might involve a conflict with an earlier-filed application, and, therefore, might be pulled out for processing before its own turn was reached. As it turned out, the Mighty-Mac application was never pulled out ahead of turn. It was taken for processing when its number (BP-15,037) was reached. Thus, it became available for processing on December 11, 1962, and has not yet been granted. Relying on the Commission's well-established policies, the principals of Lake Broadcasters, Inc. formed their corporation in order to apply for the first standard broadcast station at St. Ignace, which now has no standard broadcast station. They felt that a local group, which proposed to have all of its principals active in station operation, would constitute a more desirable licensee, from the standpoint of the public interest, than a group composed entirely of persons not residents in the area. In preparing their application, they were relying upon the fact that the Mighty-Mac application would not be reached in its proper turn for processing until sometime late in 1962.

The provisions of the Rules cited above, concerning filing of applications in the standard broadcast band, were adopted pursuant to a

suggestion of the Supreme Court in the Ashbacker case[2] to provide limits on the time within which applications must be filed in order to be considered with conflicting applications. This Court has upheld the validity of the Commission's "cut-off" rules, providing that due notice of such "cut-off" is given. Ridge Radio Corp. v. F.C.C.,110 U.S. App. D.C. 277, 292 F.2d 770 (1961). In addition to its reliance on the provisions of the Commission's Rules, especially Sections 1.106(b)(1) and 1.361(c), 47 C.F.R. Secs. 1.106(b)(1) and 1.361(c), Lake Broadcasters, Inc. was further entitled to rely on the fact that, under Commission practice, the Mighty-Mac application would not be processed until after it attained its "cut-off" date, late in 1962, and hence Lake Broadcasters, Inc. had until then to file its own application.

The foregoing authorities, the Commission's Rules, decisions of this Court, and the Order of the Commission in WMAD, Inc., 23 Pike & Fischer R.R. 469, indicate that the Commission recognizes its statutory responsibility to encourage applicants to file in conflict with other applications, so that a determination can be had as to which applicant is best suited to operate a radio station in the public interest. Potential applicants were led to rely on such policies of the Commission, and then were suddenly told without prior notice, that they could not file conflicting applications by the Order of May 10, 1962 (R. 1-5). Such action is arbitrary and capricious and must be reversed.

In an attempt to justify establishing a new "cut-off date" for all applications as of May 10, the Commission stated in its Order of October 10, denying reconsideration of its May 10th "freeze" order and ordering the return of numerous applications (R. 11-30), that the basis of its decision to prohibit further filings without notice while continuing to process pending applications was as follows: "Upon an analysis of all pending applications, we concluded that the total number of potential grants that could result from proposals on file (excluding Class IV

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[2] Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327, 333 (Footnote 9) (1945).

power increases) was not sufficiently great to frustrate the ends we sought to accomplish through our rule making." (R. 16).

Since both Mighty-Mac and Lake Broadcasters, Inc. propose the use of the same frequency in the same city, daytime only, and since Lake Broadcasters, Inc. proposes lower power (1 kilowatt) than Mighty-Mac, the Commission by considering these two applications comparatively would have only one ". . .potential grant. . .". Thus grant of either application would not ". . . frustrate . . ." the ends sought to be accomplished by the Commission's "freeze." Since both proposals are for non-directional operation, it is obvious that the application of Lake Broadcasters, Inc., since it proposes lower power, could not possibly involve any interference with any other existing stations or pending proposals greater than would be caused by the proposed operation of Mighty-Mac Broadcasting Company. The rejection of the application of Lake Broadcasters, Inc. is demonstrably arbitrary and capricious, and the Commission must be reversed, because it has conceded that with regard to the general policy of the technical rules and the revision thereof which is contemplated, it is of no particular concern whether the Mighty-Mac application or appellant's application is granted. It should be noted that, in its Order of October 10, 1962, in listing types of applications which it was refusing to accept, the Commission listed one hypothetical example which covers the situation presented by this appeal. This example is as follows:

> (d) A, an applicant filing prior to the freeze, may not possess all requisite qualifications. Acceptance of B's application makes possible a new grant where there would have been none upon denial of A's application, even when B applies for facilities identical to those sought by A. (R. 19)

It should be noted that the hypothesis which the Commission is here indulging in is inconsistent with, and is in fact the opposite of, the hypo-

thesis which the Commission used in the same Order (R. 16) when it said "Upon an analysis of all pending applications, we concluded that the total number of potential grants that could result from proposals on file (excluding Class IV power increases) was not sufficiently great to frustrate the ends we sought to accomplish through our rule making. We decided, therefore, that we could continue to process applications on file, recognizing the equitable considerations inherent in those cases without substantial sacrifice of our basic objectives (footnote omitted)."

It was indeed "equitable" for the Commission to continue to process applications already on file. But it was inequitable to refuse to accept for filing applications, then in course of preparation, where such later applications did not offer any possibility of additional grants beyond those contemplated by the earlier-filed applications. This is particularly true when the Commission's long-established procedures had clearly indicated when competing applications could be filed against applications already on file. It is no answer to say that some of the earlier-filed applications might be denied for legal or financial defects, since the Commission admitted (R. 16) that the grant of all applications then on file would be acceptable to it. As a practical matter, the disqualification of applications for legal or financial reasons when their engineering proposal is sound, is so rare that the Commission could not, and did not, rely upon the future disqualification of any fraction or percentage of the applications then on file in promulgating its "freeze" order. The Commission's processes are in disarray when it is forced to rely on inconsistent reasons to justify its actions.

II

Assuming, Arguendo, the Validity of the Order of May 10, 1962, the Commission Was Arbitrary and Capricious Under the Circumstances in Refusing to Waive the Provisions of That Order With Respect to the Application of Lake Broadcasters, Inc.

It should be noted that the Commission has carefully avoided giving any specific reason whatsoever for returning, and refusing to consider, the application of Lake Broadcasters, Inc. It hardly seems sufficient to state, as the Commission did in its orders of October 10, 1962, and January 9, 1963 (R. 22, 40) that the Commission had "carefully considered each of the requests for waiver" and that "policy considerations are such as to override the usual equities presented as grounds for waiver" in each case, without furnishing any evaluation whatsoever of any of the equities presented by the dozens of petitioners who requested waiver. Administrative agencies have a duty to fairly consider any request for waiver which may be presented to them in the proper form, and this duty can hardly be evaded by soothing assurances that there has been a "detailed examination of each waiver request," (R. 41) when the Commission's orders and letters fail to give any clue as to why a particular request for waiver was denied, even though granting the relief requested in a particular petition would not frustrate the Commission's objectives.

Failure to grant the waiver requested by Lake Broadcasters, Inc. gives the prior applicant an undeserved advantage and protects it from a competing and perhaps preferable application which may demonstrate a superior likelihood of serving the public interest. Ashbacker Radio Corp. v. F.C.C., supra. Since the application of Lake Broadcasters, Inc. would not frustrate the objectives sought to be achieved by the Commission in adopting its order of May 10, 1962, it was patently arbitrary and capricious for the Commission to fail to exercise its discretion to waive the Rule and to accept the application of Lake Broadcasters,

Inc. for filing, so that it could be considered in a consolidated hearing with the pending Mighty-Mac application.

CONCLUSION

For all the foregoing reasons, the orders herein appealed from should be reversed, and the case remanded to the Commission with directions to carry out the judgment of this Court, pursuant to the provisions of Section 402(h) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 402(h), affording Lake Broadcasters, Inc. all the relief which this Court may direct.

Respectfully submitted,

SAMUEL MILLER
MARK E. FIELDS
1032 Washington Building
Washington 5, D. C.

Attorneys for Appellant
Lake Broadcasters, Inc.

APPENDIX

STATUTES AND RULES INVOLVED

The relevant parts of the Statutes and Rules to which references are made in this brief follow:

STATUTES

Communications Act of 1934, As Amended; 47 U.S.C. Sec. 151 et seq.

Sec. 308(a) provides in part as follows:

"The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: . . ."

Sec. 308(b) provides as follows:

"All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee."

Sec. 309(a) provides as follows:

"Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application."

Sec. 309(e) provides in part as follows:

"If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. . . ."

RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION; 47 C.F.R. SEC. 1.1, et seq.

Sec. 1.106 (47 C.F.R. Sec. 1.106) provides in part as follows:

Sec. 1.106 Consolidations.

Sec. 1.106(a)

The Commission, upon motion or upon its own motion, will, where such action will best conduce to the proper dispatch of business and to the ends of justice, consolidate for hearing: (1) Any cases which involve the same applicants or involve substantially the same issues, or (2) any applications which present conflicting claims.

Sec. 1.106(b)(1)

In broadcast cases, no application will be consolidated for hearing with a previously filed application or applications unless such application, or such application as amended if amended so as to require a new file number, is substantially complete and tendered for filing by whichever date is earlier: (i) the close of business on the day preceding the day the previously filed application or one of the previously filed applications is designated for hearing; or (ii) the close of business on the day preceding the day designated by public notice published in the Federal Register as the day any one of the previously filed applications is available and ready for processing.

NOTE: Subdivision (ii) of this subparagraph applies only to standard broadcast applications for new stations or for major changes in the facilities of authorized stations. See also Sec. 1.354(c) and Sec. 1.361(b).

Sec. 1.354 (47 C.F.R. Sec. 1.354) provides in part as follows:

> **Sec. 1.354(c)**
>
> Applications for new stations (except new Class II-A stations) or for major changes in the facilities of authorized stations are processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and are drawn by the staff for study, the lowest file number first. Thus, the file number determines the order in which the staff's work is begun on a particular application. There are two exceptions thereto: the Broadcast Bureau is authorized to (1) group together for processing applications which involve interference conflicts where it appears that the applications must be designated for hearing in a consolidated proceeding; and (2) to group together for processing and simultaneous consideration, without designation for hearing, all applications filed by existing Class IV stations requesting an increase in daytime power which involve interlinking interference problems only, regardless of their respective dates of filing. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the Commission will periodically publish in the Federal Register a Public Notice listing applications which are near the top of the processing line and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all applications excepting those specified in exception (2) in this paragraph must be filed if they are to be grouped with any of the listed applications.

The note to Sec. 1.354 adopted May 10, 1962 (27 Fed. Reg. 4626) provides as follows:

> **NOTE:** Pending the Commission's re-study of the rules pertaining to allocation of standard broadcast facilities, requests for standard broadcast authorization will be considered as set forth in paragraphs (a) and (b) of this note, notwithstanding any provisions of this chapter to the contrary.
>
> (a) Applications for new standard broadcast stations or for major changes in the facilities of existing stations on the frequencies specified in § § 3.25, 3.26, and 3.27 of this chapter, will be accepted for filing only when the applications fall within the following categories:

(1) Applications requesting authority to increase power of existing Class IV stations on local channels from 250 watts, not to exceed 1 kilowatt, or, from 100 watts to 250 watts or 500 watts.

(2) Applications for new Class II-A stations specified in § 3.22 of this chapter.

(3) Applications for other facilities, except new 100 watt Class IV proposals, where a showing has been submitted to demonstrate that the proposed operation (i) would bring a first interference-free primary service, day or night, to at least 25% of the area or 25% of the population within the proposed interference-free service contour; and (ii) would not cause any objectionable interference to existing stations, and would not involve prohibited overlap as specified in § 3.37 of the Rules with existing stations.

(b) Applications for standard broadcast facilities now pending will be processed and acted upon in normal course. Applications for new stations or for major changes in existing stations tendered for filing after May 10, 1962, which are not consistent with the interim criteria, will be returned to the applicant.

Section 1.361 (47 C.F.R. Sec. 1.361) provides in part as follows:

Sec. 1.361(c)

In making its determinations pursuant to the provisions of paragraph (b) of this section, the Commission will not consider any other application, or any other application if amended so as to require a new file number, as being mutually exclusive or in conflict with the application under consideration unless such other application was substantially complete and tendered for filing by whichever date is earlier: (1) The close of business on the day preceding the day on which the Commission takes action with respect to the application under consideration; or (2) the close of business on the day preceding the day designated by public notice in the Federal Register as the day the application under consideration is available and ready for processing.

NOTE: Paragraph (c)(2) of this section applies only to standard broadcast applications for new stations or for major changes in the facilities of authorized stations. See also § § 1.106(b)(1) and 1.354(c) and (h).

BRIEF FOR APPELLEE

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ON APPEAL FROM AN OPINION AND ORDERS OF
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MAX D. PAGLIN,
General Counsel,

DANIEL R. OHLBAUM,
Associate General Counsel,

ERNEST O. EISENBERG,
Counsel.

Federal Communications Commission
Washington 25, D. C.

STATEMENT OF QUESTIONS PRESENTED

The questions presented in this case were agreed upon in a prehearing stipulation which was approved by Order of this Court on March 20, 1963. These questions are as follows:

1. Did the Commission act arbitrarily and capriciously, and did it deprive appellant of due process of law, when it returned appellant's application without a hearing as provided in Section 309 of the Communications Act?

2. Does the Commission's "freeze" rule, as applied here, violate the doctrine of Ashbacker Radio Corporation v. Federal Communications Commission, 326 U.S. 327, that a later application for a frequency in a particular city is entitled to comparative consideration with an earlier-filed one?

3. Was the Commission's refusal to consider appellant's application on its merits or to consider waiver of the "freeze" when requested, arbitrary and unreasonable in light of the Commission's continued consideration and granting of other applications?

4. Did the Commission commit error in not accepting appellant's application by reason of the Commission's omission to enunciate specific findings of fact and conclusions of law with respect to appellant's assertion that its application was entitled to comparative consideration with BP-15037?

TABLE OF CONTENTS

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

JURISDICTIONAL STATEMENT

This case involves an appeal under Section 402(b)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 402 (b)(1), by Lake Broadcasters, Inc. (Lake), a Michigan corporation, from the following actions and orders of the Commission:

(1) The Commission's Report and Order of May 10, 1962 (R. 1-5), establishing a general "freeze" (hereinafter referred to as the "freeze" order), subject to certain exceptions, on Commission acceptance of applications for new standard broadcast stations or for major changes in existing stations; (2) the Commission's letter of October 10, 1962 (R. 31), returning Lake's application for a construction permit for a new standard broad-

cast station at St. Ignace, Michigan, and denying Lake's petition for reconsideration or waiver of the interim criteria established in the "freeze" order; (3) the Commission's Memorandum Opinion and Order released January 11, 1963 (R. 40-44), denying Lake's petition for reconsideration; and (4) the Commission's letter order dated January 15, 1963 (R. 45), again returning Lake's application as being inconsistent with the "freeze" order.

It is the Commission's view that this case is properly within the jurisdiction of this Court under the decisions in Ranger v. Federal Communications Commission, 111 U.S. App. D.C. 44, 294 F.2d 240, and Ridge Radio Corp. v. Federal Communications Commission, 110 U.S. App. D.C. 277, 292 F.2d 770.

COUNTERSTATEMENT OF THE CASE

Appellant's Statement of the Case is not complete, and we believe that the following additional presentation will be of assistance to the Court.

The pertinent facts are as follows:

A. The Commission's Report and Order of May 10, 1962.

On May 10, 1962, the Commission released a Report and Order, effective that same day (R. 1-5), in which it amended Section 1.354 of the Commission's Rules (47 CFR 1.354) to establish a temporary, partial "freeze" on the acceptance of applications for new and changed standard broadcast (AM) radio

facilities. The Commission stated that it found it necessary to impose an immediate "freeze" because the tremendous growth in the number of standard broadcast stations from 955 in 1945 to 3,871 in 1962 had created certain problems which called for an immediate re-examination of the standards employed by the Commission in assigning new or changed standard broadcast facilities. An explanation of these problems and of the purposes contemplated by the "freeze" order was set forth in the Commission's recent brief (at pp. 5-9) filed with this Court on May 6, 1963, in the group of consolidated cases headed by the appeal of Joseph J. Kessler, tr/as WBXM Broadcasting Company v. Federal Communications Commission, Case No. 17,363, and is incorporated into this brief by reference. 1/

The Commission stated that the interim procedures adopted by the "freeze" order related to matters of practice and procedure before the Commission, and that proposed rule making in accordance with the provisions of Section 4 of the Administrative Procedure Act, 5 U.S.C. 1003, was not required. 2/ Commissioner Hyde dissented, stating that he thought the adoption of the interim proceduresw as "essentially a substantive policy decision and ought to be the subject of a public notice before decision" (R. 4).

1/ A copy of the Commission's brief in the Kessler case, supra, is being served upon the appellant together with this brief.
2/ Section 4 of the Administrative Procedure Act, in pertinent part, is set forth in the Appendix hereto.

The interim "freeze" procedures were incorporated as the following Note to Section 1.354 of the Commission's Rules (47 CFR 1.354):

§ 1.354 Processing of standard broadcast applications.

* * * * *

NOTE: Pending the Commission's re-study of the rules pertaining to allocation of standard broadcast facilities, requests for standard broadcast authorizations will be considered as set forth in paragraphs (a) and (b) of this note, notwithstanding any provisions of this chapter to the contrary.

(a) Applications for new standard broadcast stations or for major changes in the facilities of existing stations on the frequencies specified in §§ 3.25, 3.26, and 3.27 of this chapter, will be accepted for filing only when the applications fall within the following categories:

(1) Applications requesting authority to increase power of existing Class IV stations on local channels from 250 watts, not to exceed 1 kilowatt, or, from 100 watts to 250 watts or 500 watts.

(2) Applications for new Class II-A stations specified in §3.22 of this chapter.

(3) Applications for other facilities, except new 100 watt Class IV proposals, where a showing has been submitted to demonstrate that the proposed operation (i) would bring a first interference-free primary service, day or night, to at least 25% of the area or 25% of the population within the proposed interference-free service contour; and (ii) would not cause any objectionable interference to existing stations, and would not involve prohibited overlap as specified in Section 3.37 of the Rules with existing stations.

(b) Applications for standard broadcast facilities now pending will be processed and acted upon in normal course. Applications for new stations or for major changes in existing stations tendered for filing after May 10, 1962,

which are not consistent with the interim criteria, will be returned to the applicant.

B. Appellant's Tender Of Application.

Following the release of the Commission's Report and Order of May 10, 1962, the Commission received numerous petitions requesting Commission acceptance of applications tendered for filing after the "freeze" (R. 11). Lake filed such a petition on July 31, 1962 (R. 6-7), and submitted an application for a construction permit for a new standard broadcast station to operate at St. Ignace, Michigan, on a frequency of 940 kc, with power of one kilowatt (R. 6, 33). In its petition Lake stated that its application did not meet the interim criteria established by the "freeze" order (R. 6), but that its proposal was competitive with the application of the Mighty-Mac Broadcasting Company (Mighty-Mac), filed on August 14, 1961, for a construction permit for a new standard broadcast station to operate at St. Ignace, Michigan, on a frequency of 940 kc, with power of 5 kilowatts (R. 6). Lake contended that to the extent that the "freeze" order deprived appellant of comparative consideration with the Mighty-Mac application, which as of July 31, 1962 was still on the processing line, the "freeze" order was unlawful (R. 6, 7).

Lake also requested a waiver of the "freeze" order, stating that since it was applying for the identical facilities sought by Mighty-Mac, the allocation questions involved

in the imposition of the "freeze" were not applicable in its case, and that the public interest would be promoted by a comparative consideration of the qualifications of the competing applicants (R. 7).

On October 10, 1962, the Commission returned Lake's application as being inconsistent with the interim criteria established in the Note to Section 1.354 of the Commission's Rules, and advised Lake by letter of the same date (R. 31) that Lake's petition for reconsideration of the "freeze" order had not been timely filed under Section 1.191 of the Commission's Rules (now Section 1.84) and under Section 405 of the Communications Act of 1934, as amended. The Commission pointed out that a number of similar petitions for reconsideration involving essentially the same substantive contentions as those raised by Lake had been timely filed, and that these petitions had been denied by a Memorandum Opinion and Order adopted October 10, 1962 (R. 11-30). A copy of this Memorandum Opinion and Order was addressed to Lake. The Commission also denied Lake's request for waiver of the interim criteria of the "freeze", stating that in its Memorandum Opinion and Order of October 10, 1962 it had considered and denied numerous requests for waiver, and that the reasons there stated were equally applicable to Lake's request for waiver (R. 31).

A detailed statement of the Commission's rationale for the Memorandum Opinion and Order of October 10, 1962,

has been set forth in the Commission's brief (at pp. 21-27) filed with this Court on May 6, 1963, in the group of consolidated cases headed by the appeal of Joseph J. Kessler, tr/as WBXM Broadcasting Company v. Federal Communications Commission, Case No. 17,363, and is incorporated into this brief by reference.

On November 9, 1962, Lake filed a petition for reconsideration of the Commission's action of October 10, 1962 (R. 33-36). Lake again urged that the grant of its request for waiver and acceptance of its application would not frustrate or impede any of the objectives sought to be achieved by the "freeze" order (R. 33). Lake pointed out that the application of Mighty-Mac, with which it sought comparative consideration, had not yet been reached for processing, and was listed on the Commission's cut-off list, released November 2, 1962,[3/] as being available for processing on December 11, 1962, and that the public of St. Ignace was entitled to have the Commission choose between Mighty-Mac and Lake (R. 33-34). Lake asserted that Commission refusal to accept its application and to consider it on a comparative basis with the Mighty-Mac application would deprive

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3/ The Commission's procedure in publishing cut-off lists has been in effect since April 9, 1959, when the Commission amended Section 1.354 of its Rules to institute this practice, and has been recognized by this Court as constituting a valid procedural device to expedite the Commission's processing of applications. Century Broadcasting Corporation v. Federal Communications Commission, --- U.S. App. D.C. ---, 310 F.2d 864; Ranger v. Federal Communications Commission, 111 U.S. App. D.C. 44, 294 F.2d 240.

Lake of its rights under Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (R. 35).

Mighty-Mac filed an opposition to Lake's petition on November 26, 1962 (R. 37-39), stating that Lake was without any equity in requesting a waiver since it knew of the filing of Mighty-Mac's application on August 14, 1961, and then waited almost a full year until July 31, 1962, before it tendered its own application (R. 37).

C. The Commission's Memorandum Opinion And Order Of January 9, 1963.

On January 9, 1963, the Commission, with Commissioner Hyde dissenting, adopted a Memorandum Opinion and Order (R. 40-44), which it released on January 11, 1963, denying numerous petitions and requests, including that of Lake (R. 40, 44), for waiver of the interim criteria adopted by the "freeze" order, and for reconsideration of the Commission's action, based on the Commission's Memorandum Opinion and Order of October 10, 1962 in returning applications filed subsequent to the "freeze" order.

The Commission rejected the contentions of the various petitioners questioning the legality of the "freeze", stating that no arguments had been advanced by these petitioners which were not discussed and disposed of in the Opinion of October 10, 1962 (R. 40). The Commission also denied all requests for waiver of the "freeze," It pointed out that the following language set forth in the Opinion of

October 10, 1962, was applicable (R. 40-41):

> We have carefully considered each of the requests for waiver and have concluded that each must be denied. The present freeze rule is one which has as its basis policy considerations of the utmost importance. It is our opinion that these policy considerations are such as to override the usual equities presented as grounds for waiver. A detailed examination of each waiver request considered herein has convinced us that, accepting the various factual allegations of petitioners as true, insufficient grounds have been set forth to justify waiver of the rule in any of the cases here presented. See United States v. Storer Broadcasting Company, 351 U.S. 192 (1956).

The Commission then stated that every request for waiver had been considered individually, and that the vast majority of these requests cited reasons for waiver which did not in the Commission's opinion override the policy considerations upon which the interim criteria of the "freeze" were based (R. 41). In the Appendix attached to this Memorandum Opinion and Order of January 9, 1963 (R. 43,44), the Commission specifically listed the name of Lake, and stated that Lake's petition, received November 9, 1962, for reconsideration and return of application, was denied (R. 42, 44).

On January 15, 1963, the Commission addressed a letter to Lake's attorney (R. 45), returning Lake's application as being inconsistent with the interim criteria contained in the "freeze" order, and enclosing a copy of the Commission's Memorandum Opinion and Order of October 10, 1962.

SUMMARY OF ARGUMENT

The "freeze" on standard broadcast applications was properly adopted by the Commission and constituted a reasonable exercise of the Commission's procedural powers. Lake's arguments attacking the "freeze" are substantially similar to those which were presented in the consolidated cases headed by the appeal of Joseph J. Kessler, tr/as WBXM Broadcasting Company v. Federal Communications Commission, Case No. 17,363, and the Court is respectfully referred to the Commission's brief in these consolidated cases (pp. 33-60) for a full presentation of the Commission's position.

The Commission acted within its discretion in refusing to waive the "freeze" for Lake. Lake contends that its application was mutually exclusive with the application filed by Mighty Mac, and that acceptance of its application could not frustrate the purpose of the "freeze" since only one potential grant was involved. Lake's contention, however, fails to take into account the fact that an award to Mighty Mac might never be made. The Commission recognized when it imposed the "freeze" that a certain number of pending applications would never materialize into grants, and this was one of the factors which led the Commission to conclude that the total number of potential grants that could result from proposals on file on May 10, 1962, was not sufficiently great to frustrate the purpose of the "freeze". Lake's request for waiver

on the ground of mutual exclusivity with a pending application would, if granted, require waivers for other applicants making similar claims of mutual exclusivity with pending applications, and would open the door to a very large number of new applications (theoretically double the number of those pending on May 10, 1962) which could tend to defeat the purpose of the "freeze" by resulting in a far greater number of new grants than the Commission contemplated.

ARGUMENT

Lake's appeal rests essentially upon two contentions which may be summarized as follows: First, that the Commission violated the provisions of the Communications Act of 1934, the rules issued thereunder, and applicable judicial precedent in adopting the "freeze" order without prior notice; and second, that the Commission was arbitrary and capricious in refusing to waive the provisions of the "freeze" order with respect to Lake's application (Br. 7-12).

The arguments on the first point are substantially similar to those which were presented in the consolidated cases headed by the appeal of Joseph J. Kessler, tr/as WBXM Broadcasting Company v. Federal Communications Commission, Case No. 17,363. We believe that our brief in these consolidated cases (pp. 33-60), to which the Court and the appellant herein are respectfully referred, adequately presents the Commission's position on these matters. Therefore, we will not repeat our argument on this point.

A specific additional comment is warranted with respect to Lake's assertion that the Commission was arbitrary and capricious in refusing to waive the provisions of the "freeze" in Lake's case. Lake urges that because Lake's and Mighty Mac's applications were both for the same frequency in the same community, and since a grant would be made in any event for a broadcast station to operate at St. Ignace, Michigan, on the

frequency 940 kc, the purpose of the "freeze" could not be frustrated by the Commission's acceptance of Lake's application (Br. 9-11). However, Lake is assuming an award which may never be made.

The Commission explained the necessity for the imposition of the "freeze" in its Report and Order of May 10, 1962, in the following language (R. 3):

> We feel that the first step necessary to permit an undertaking of the magnitude here involved is a partial halt in our acceptance of standard broadcast applications. This step is essential so that we may avoid compounding present difficulties with a continual flow of new assignments based upon existing, possibly inadequate, standards. On the other hand, we believe that procedural fairness requires that we complete processing those applications currently on file, although we take occasion to note, our consideration of these applications must take into account what we have said here and will reflect our desire to avoid unnecessary aggravation of the problems we have discussed.

Subsequently, in the Memorandum Opinion and Order of October 10, 1962, the Commission amplified the above observations by stating (R. 16-17):

> * * * the Commission concluded that a meaningful rule making proceeding concerning standard broadcast assignment could not be held if we continued to accept and grant, at the same time, applications which would only aggravate the very problems we were trying to solve. Having reached this initial conclusion, it became necessary to determine the nature and extent of the "freeze" necessary to accomplish our objectives. Upon an analysis of all pending applications, we concluded that the total number of potential grants that could result from proposals on file, (excluding Class IV power increases), was not sufficiently great to frustrate the ends we sought to accomplish through our rule making. We decided, therefore, that we could continue to process applications on file, recognizing the equitable considerations inherent in those cases, without substantial sacrifice of our

> basic objectives. At the same time, however, we recognized that any further acceptance of new applications would raise the number of grants to an intolerable level and, accordingly, it was concluded that we must exercise our administrative discretion so as to bar such new applications.
> * * *

In estimating the total number of potential grants that could result from proposals on file prior to May 10, 1962, the Commission realized of course that a certain number of these proposals would never materialize into grants. It rejected all requests for waiver which, if granted, could have the effect of increasing the total number of actual awards (R. 18-19, 22). The Commission specifically referred to the situation presented by Lake, giving as an example the following (R. 19):

> A, an applicant filing prior to the freeze, may not possess all requisite qualifications. Acceptance of B's application makes possible a new grant where there would have been none upon denial of A's application, even when B applies for facilities <u>identical</u> to those sought by A.

A grant of Lake's petition for waiver of the "freeze" would have required an exemption from the "freeze" of all post-"freeze" applications seeking the identical locations and frequencies sought by the pending applications filed prior to May 10, 1962. The door would have been opened to a substantial number of additional applications, theoretically doubling the number pending at the time of the "freeze". This

would have substantially increased the probable number of grants. In short, Commission assent to Lake's request for waiver could not have been granted on the simple basis Lake urges.

In its Memorandum Opinion and Order of October 10, 1962, the Commission properly denied all pending requests for waiver of the "freeze", including those similar to Lake's, stating (R. 22):

> We have carefully considered each of the requests for waiver and have concluded that each must be denied. The present freeze rule is one which has as its basis policy considerations of the utmost importance. It is our opinion that these policy considerations are such as to override the usual equities presented as grounds for waiver. A detailed examination of each waiver request considered herein has convinced us that, accepting the various factual allegations of petitioners as true, insufficient grounds have been set forth to justify waiver of the rule in any of the cases here presented. See United States v. Storer Broadcasting Company, 351 U.S. 192 (1956). We note additionally that the grant of any one of the waiver requests involved here would not be justifiable vis-a-vis most of the others since the factual gradations between the cases are generally small. To embark upon a wholesale grant of waiver requests would obviously destroy the ends we sought to accomplish in adopting the interim criteria.* * *

The Commission re-affirmed its position in its Memorandum Opinion and Order of January 9, 1963 (R. 40-44), in which it gave consideration to Lake's petition for waiver, among numerous others, and stated:

> * * * We must state again that every request for waiver received by the Commission has been considered individually. The vast majority of these requests cite reasons for waiver based on various equities which do not, in our opinion, override the policy considerations

> upon which the interim criteria are based. For convenience, we have treated many requests of this kind in a single document since our disposition of each has been governed by the same principle.* * *

In light of the foregoing discussion it is clear that the Commission was correct when it concluded that it could not properly maintain the "freeze" if it granted the requests for waivers, including Lake's, where the applications did not come within the exceptions already provided.[4/] The refusal of the Commission to waive the "freeze" for Lake, based upon the showing made by the appellant, was within the Commission's reasonable discretion.

4/ The Commission recognized certain requests for waivers (R. 41) where an existing station might otherwise be forced off the air through loss of its transmitter site, or where an application was filed for a new station to replace a former station which had gone off the air, or where no changes in the basic licensed facilities were involved.

CONCLUSION

For the foregoing reasons, the Commission's Orders should be affirmed.

Respectfully submitted,

MAX D. PAGLIN,
General Counsel,

DANIEL R. OHLBAUM,
Associate General Counsel,

ERNEST O. EISENBERG,
Counsel.

Federal Communications Commission
Washington 25, D. C.

June 3, 1963

APPENDIX

STATUTES INVOLVED

Administrative Procedure Act, 5 U.S.C. 1001, et seq., as amended

Sec. 4 (5 U.S.C. 1003):

"Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.-

"(a) Notice. - General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the findings and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(b) Procedures. - After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of §§7 and 8 shall apply in place of the provisions of this subsection.

"(c) Effective Dates. - The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

"(d) Petitions. - Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule."

REPLY BRIEF FOR APPELLANT
LAKE BROADCASTERS, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,595

LAKE BROADCASTERS, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee

SAMUEL MILLER

MARK E FIELDS

1032 Washington Building
Washington 5, D. C.

Attorneys for Appellant
Lake Broadcasters, Inc

INDEX

United States Court of Appeals

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FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal from Memorandum Opinion and Order
and Letter and Report and Order of
Federal Communications Commission

REPLY BRIEF FOR APPELLANT LAKE BROADCASTERS, INC.

SUMMARY OF ARGUMENT

The Commission's denial of waiver in this case rests on the assumption that grant of waiver in such cases, where the applicant applied for the same frequency as an earlier-filed application in the same city with no higher power, would produce a substantial or significant number of additional grants. Such additional grants would occur where the earlier-filed application was defective in some way, but the later-filed one

was in proper form for grant. But the Commission adduces no facts to indicate that this would occur in any significant number of cases. Therefore its denial of waiver rests on mere assertion.

ARGUMENT

The argument contained in the Commission's Brief (pp. 12-16) rests entirely on the premise that an intolerably large number of grants for new stations would result if the Commission were to grant waiver in the circumstances presented by this application. It should be noted that this argument by the Commission does not deal with appellant's request for waiver on its merits. Rather the Commission asserts that even if the argument for waiver were meritorious, it must be denied anyway because of the necessity of forestalling too many new standard broadcast grants.

The Commission, however, did decide to continue processing all standard broadcast applications pending on May 10, 1962. Therefore, in this case, the Commission is forced to argue that the continued processing of those applications pending on May 10, 1962, would not result in too many grants, but consideration of any competing applications for the same cities on the same frequencies would result in too many grants. The Commission attempts to make this argument in its Brief (p. 14). However, the Commission's argument in this regard is remarkable for its vagueness. Nowhere is there any evidence that any substantial number of new grants would materialize from accepting competing applications for the same cities on the same frequencies which would not have materialized by processing only those applications on file on May 10, 1962. This omission of any facts to support the naked assertion that there would be many more grants as a result of comparative proceedings is notable, for the Commission itself possesses the information and expertise with which to supply the relevant facts. Appellant's initial Brief (p. 10) asserted that denial of applications because of disqualification is rare. The Commission's Brief, carefully sidestepping the problem, does not even controvert, much less disprove, this contention.

Thus, the crucial question is this: Whether consideration of competing applications for the same cities on the same frequencies as those previously pending would result in only a few additional grants, thereby not contributing substantially to the crowded condition of the standard broadcast spectrum, or whether such comparative proceedings would lead to a substantial number of additional grants.

The Commission in its Brief (p. 15) asserts that the latter would be the case. However, it is noteworthy that the Commission's orders and letters in this proceeding nowhere assert that any substantial or significant number of additional grants would occur if comparative proceedings were allowed. Thus the assertion that there would be a substantial increase in the number of grants is merely an unsupported assertion made by Commission counsel in their brief, and in no way constitutes a declaration by the Commission based on its expertise or experience, or on any other apparent basis.

On the contrary, judging from the number of appeals before this Court from the Commission's refusal to accept post-May 10, 1962 applications, wherein the appellant (as here) sought to apply for the same frequency in the same city as an earlier-filed applicant, it appears that no large number of new grants would result from grant of waiver in such cases. As of the date of this brief, there have been only two appeals (including this one) wherein the appellant filed for the same frequency and same city as an application filed before May 10, 1962. It is submitted that when the Commission issues an order resting on a premise having no factual basis, the error cannot be remedied by a statement by counsel in a Brief that the premise is factually correct.

It was, therefore, arbitrary for the Commission to deny a request for waiver, meritorious on its face, when the basis for such denial was a supposition not based on any facts either recited by the Commission or generally known to exist. This omission is particularly significant because the matter at issue (the percentage of denials which may be expected to result from a number of applications) is a matter susceptible

of determination by statistical methods and is purely within the knowledge of the Commission. The omission of any assertion that allowing a hearing to competing applications for the same cities on the same frequencies would produce substantially or significantly more grants indicates that denial of waiver here was not necessary to prevent an excessive number of grants during the freeze period. Therefore there was no valid reason for denying waiver.

CONCLUSION

For the foregoing reasons, and the reasons set forth in appellant's initial Brief, the orders herein appealed from should be reversed and the case remanded to the Commission.

Respectfully submitted,

SAMUEL MILLER

MARK E. FIELDS

1032 Washington Building
Washington 5, D. C.

Attorneys for Appellant,
Lake Broadcasters, Inc.

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Federal Communications Commission

JOINT APPENDIX

INDEX

[1]

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington 25, D.C.

FCC 62-516
18951

In the Matter of)
Interim Criteria to Govern)
Acceptance of Standard)
Broadcast Applications)

REPORT AND ORDER

By the Commission: Commissioner Hyde dissenting and issuing a statement.

1. The present rules governing assignment of standard broadcast facilities are virtually unchanged from those adopted two decades ago. Between 1945 and 1962, the number of authorized standard broadcast stations has grown from 955 to 3,871, and the fact of this tremendous growth coupled with the particular way in which the growth has occurred, has created problems which differ greatly from those anticipated when the present standard broadcast rules were adopted. As explained more fully in the paragraphs which follow, the Commission believes that an immediate need exists to examine the problems of standard broadcast assignment in fresh perspective. We believe that the time has come to re-study the standards under which we consider new and changed assignments and, as a first step toward this end, we find it necessary to bring a temporary, partial halt to our acceptance of applications for new and changed facilities.

2. To understand the difficulties we face today, it is necessary to refer, briefly, to the evolution of the standard broadcast service as it has developed since the Second World War. Pre-war radio service suffered from what the Commission recognized to be three principal deficiencies: lack of any local outlet in many communities of substantial size, absence of competing local stations in communities

that did have a facility, and substantial "white" areas in the Northeast, Midwest, South, and Far West. Accordingly, the goals the Commission sought to achieve in bringing about the post-war growth of radio were specifically directed toward fulfillment of these three needs. It was always recognized that, to some degree, providing local outlets and fostering competition were objectives inconsistent with the Commission's third aim, that of eradicating "white" areas, but, it was felt that a case-to-case balancing of the competing considerations would result in an assignment scheme reflecting relatively equal achievement in each area.

3. The hope for balanced achievement has not, however, been realized in fact. The standard broadcast service has grown so as to fulfill the Commission's first two objectives to an unexpected degree. A large majority of communities [1/] of 10,000 and over (and many with a population of under 10,000) have their own local outlets. There are few counties in the United States which do not have a choice of multiple signals. Multi-station communities have grown similarly, so that lack of competition in the standard broadcast band can no

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1/ Suburban communities within standard metropolitan statistical areas are not considered separate communities for the purpose of this analysis.

longer be regarded as a serious problem. At the same time, this tremendous proliferation of stations has occurred without significant reduction of "white" areas. The outlying areas which lacked primary service in 1946 have been reduced only a minute degree by the continual flow of new assignments. More than this, concentration upon the creation of multi-station markets has led to a derogation of engineering standards, so that service rendered by existing stations in the outermost regions of their normally protected service areas has been

impaired, future power increases to extend the interference-free contour over growing suburban populations are often rendered impossible, and the available channels for the establishment of new stations in growing underserved areas have been continually reduced in number.

4. In the face of this mounting problem, it becomes necessary to ask ourselves whether the present rules governing assignment of new and changed facilities, and the substantial body of precedent which has become intertwined with many of the rules, frustrate implementation of a more efficient pattern of station assignment. Properly, this question forms the core of the thorough reappraisal of the Standard Broadcast Rules which must become the subject of formal rule-making proceedings. It is possible at this time, however, to delineate at least two areas of major concern.

5. First, certain of the technical rules, entirely adequate when adopted, have lost their practical validity as the number of stations has grown. For example, presently employed RSS exclusion principles for calculating nighttime interference, which are effective if only a few stations enter the RSS limit, become progressively less precise as the number of interfering sources is increased. Again, levels of signal intensity required for residential and business areas of a particular community were predicated upon maintenance of a normally protected contour some distance from the center of the city served. When this contour is not maintained, it may no longer be said with certainty that the signal level required for city service is adequate to insure a sufficient signal under all conditions.

6. Second, and of greater importance, is the fact that, owing to intense concentration upon providing local outlets and competitive services, many of the most crucial standards have been impaired by built-in exceptions and by waivers. The two prime examples of this phenomenon are the rules most basically involved in the steady deterioration of the protected service area concept, i.e., the rules concerning

[2]

interference which may be caused and which may be received by an applicant for new or changed facilities. Section 3.24(b) of the Rules provides that a new facility must not cause interference to existing stations unless the need for the new service outweighs the need for the service to be lost. Unfortunately, neither of the factors to be weighed takes into consideration, except most indirectly, the values inherent in maintaining what is ordinarily considered to be an adequate separation between stations. Since, most often in an individual case, a proposed new station will provide a new service to a considerably greater number of persons than reside in the area of interference, interference to existing stations, unless extraordinary in amount, has not been a major factor leading to denial of applications. The rule concerning interference received by a proposed operation has

[3]

more directly involved a weighing of engineering considerations against non-engineering factors, again to the detriment of the former. Section 3.28(d)(3) provides that a proposed facility may receive no more than ten percent population loss by reason of interference within its normally protected contour. However, Section 3.28(d)(3) contains several significant exceptions which have permitted numerous grants of proposals receiving interference far in excess of ten percent. Beyond the exceptions, an ever-increasing number of non-engineering factors has been found to justify waiver of the Rule in individual cases, each of which has been added to the body of precedent that inextricably merges with the Rule itself as it is applied in subsequent cases. The result has been a developing system of assignments that may be justified in terms of each individual case, but which, on the whole, bears little relation to the rational assignment system represented by the protected contour concept in undiluted form.

7. The Commission is convinced that the problems discussed above compel us to re-examine, immediately, the standards employed in

assigning new or changed standard broadcast facilities. We propose to issue a notice of proposed rule making which will propose deeper exploration in many of the areas we have mentioned here. We will seek to determine, among other points, whether many technical portions of the rules continue to be useful tools under present conditions; whether many of the rules have been impaired by their built-in exceptions; whether the body of precedent which has grown up about the practice of granting waivers of certain sections has eroded the sections involved; and, as a result of these determinations and others, to what extent revision of the rules and of our practices would be appropriate. It will be necessary to ask basic questions concerning such matters as the present limits employed to define the normally protected contour of the various classes of stations, and to re-examine the concept of what constitutes a "community" for the purposes of allocating local services. Most significantly, we will need to ask whether, under present-day conditions, our station assignment principles should provide at all for a weighing of engineering standards against subjective non-engineering factors.

8. We feel that the first step necessary to permit an undertaking of the magnitude here involved is a partial halt in our acceptance of standard broadcast applications. This step is essential so that we may avoid compounding present difficulties with a continual flow of new assignments based upon existing, possibly inadequate, standards. On the other hand, we believe that procedural fairness requires that we complete processing those applications currently on file, although we take occasion to note, our consideration of these applications must take into account what we have said here and will reflect our desire to avoid unnecessary aggravation of the problems we have discussed. We believe, moreover, that we may continue to accept for filing certain defined categories of applications which would not frustrate the ends we seek to achieve by our re-study, or for which there are strong public interest considerations weighing in favor of acceptance.

[3]

Accordingly, the interim processing criteria we adopt today provide for the continued acceptance of certain applications which would bring service to "white" areas and which would cause no interference to existing stations. We will also accept applications for new Class II-A facilities as specified in Section 3.22 of the Rules since, in the Clear Channel Proceeding, we have determined that

[4]

these new assignment would serve the public interest. Finally, the Commission feels that we must continue to accept most applications for Class IV power increases. Approximately 500 authorizations to increase the power of Class IV stations to one kilowatt have been granted to date, and, since the effectiveness of the general plan allowing Class IV power increases is dependent upon all such stations (except those restricted by international considerations) increasing power, it is essential that we continue to accept applications from those stations who have not yet increased power and which are, in many cases, suffering substantial interference from those Class IV stations which have been granted increases.

9. We also note at this time that the Commission's revision of the rules governing allocation in the FM broadcast service is nearing completion. The Commission suggests that potential applicants for facilities inthe crowded standard broadcast band give serious consideration to the greater coverage possibilities provided, both day and night, in the FM band.

10. Since the interim procedures set forth in the appendix hereto relate to matters of practice and procedure before the Commission, proposed rule making in accordance with the provisions of Section 4 of the Administrative Procedure Act is not required. Authority for the adoption of the interim procedures is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

Accordingly, IT IS ORDERED, this 10th day of May, 1962, that

Section 1.354 of the Commission's Rules IS AMENDED as set forth in the attached appendix, effective May 10, 1962.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Acting Secretary

Released: May 10, 1962

NOTE: Rules changes herein will be covered by T.S. I-19.

* Dissenting Statement of Commissioner Hyde

I think this is essentially a substantive policy decision and ought to be the subject of a public notice before decision.

[5]

APPENDIX

Section 1.354 is amended to add the following Note:

§ 1.354 Processing of standard broadcast applications.

* * *

NOTE: Pending the Commission's re-study of the rules pertaining to allocation of standard broadcast facilities, requests for standard broadcast authorizations will be considered as set forth in paragraphs (a) and (b) of this note, notwithstanding any provisions of this chapter to the contrary.

(a) Applications for new standard broadcast stations or for major changes in the facilities of existing stations on the frequencies specified in §§ 3.25, 3.26, and 3.27 of this chapter, will be accepted for filing only when the applications fall within the following categories:

(1) Applications requesting authority to increase power of existing Class IV stations on local channels from 250 watts, not to exceed 1 kilowatt, or, from 100 watts to 250 watts or 500 watts.

(2) Applications for new Class II-A stations specified in § 3.22 of this chapter.

(3) Applications for other facilities, except new 100 watt Class IV

proposals, where a showing has been submitted to demonstrate that the proposed operation (i) would bring a first interference-free primary service, day or night, to at least 25% of the area or 25% of the population within the proposed interference-free service contour; and (ii) would not cause any objectionable interference to existing stations, and would nd involve prohibited overlap as specified in Section 3.37 of the Rules with existing stations.

(b) Applications for standard broadcast facilities now pending will be processed and acted upon in normal course. Applications for new stations or for major changes in existing stations tendered for filing after May 10, 1962, which are not consistent with the interim criteria, will be returned to the applicant.

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[6]

[Rec'd. July 31, 1962]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D.C.

In re Applications of	
Mighty-Mac Broadcasting Company	File No. BP-15,037
Lake Broadcasters, Inc.	File No. BP_____
Each requesting construction permit for new AM station, St. Ignace, Michigan, 940 KC, daytime only.	

PETITION FOR ACCEPTANCE OF APPLICATION AND WAIVER OF SECTION 1.354

Lake Broadcasters, Inc. respectfully petitions the Commission to accept its above-captioned application for a new standard broadcast station and to waive Section 1.354 of its Rules in this connection. In support thereof, it is shown as follows:

9

1. On May 10, 1962, the Commission released without notice and without any prior rulemaking procedure, a public notice amending Section 1.354 of its rules. In effect, the Commission stated that it would not accept for filing henceforth any standard broadcast applications for new facilities unless they met certain stringent requirements. (Petitioner's application does not meet these requirements of "white" area, although its proposed coverage area is underserved.) The theory of the new policy was stated to be the necessity of examining the AM allocation policy, particularly in view of the concentration of radio facilities in populous centers already having multiple outlets.

2. As part of its order, the Commission provided, however, that it would continue to process the applications on file as of May 1962, regardless of when they were filed or whether they had already been cut off under existing rules. Among the applications then (and still now) on file was the application of Mighty-Mac Broadcasting Company which requests 940 kc with power of 5 kw at St. Ignace, Michigan (File No. BP-15,037). This application was filed on August 14, 1961 and as of today is No. 57 in the processing line. Under the Commission's rules as they existed as of May 10, 1962, that application would still be subject to competitive filings. However, by virtue of its action of May 10, 1962, taken without notice, the Commission as of that date gave Ashbacker protection to all then pending applications. Thus, this applicant was given a substantive right

to the injury of the instant petitioner who otherwise would be entitled to comparative consideration. Unless Petitioner's application is accepted, it is a party aggrieved by this unlawful amendment of the Commission's rules.

3. Assuming arguendo that the Commission's Public Notice of May 10, 1962 was valid despite lack of notice, nevertheless waiver of Section 1.354 is required here in the public interest. Since petitioner requests the identical facility proposed in an application already on

file as of May 10, 1962, it is evident that the allocation questions involved in the imposition of the AM freeze are not pertinent. The technical question as to whether 940 kc daytime only at St. Ignace, Michigan would be a proper allocation from an allocation standpoint will be considered when the Commission reaches the Mighty-Mac application. The acceptance of petitioner's application will not affect this judgment since petitioner is requesting the identical frequency. Thus, a waiver of Section 1.354 in petitioner's case cannot adversely affect any of the objectives involved in the imposition of the freeze.

4. On the other hand, the public interest will be promoted by acceptance of petitioner's application. It will permit the Commission to judge on a comparative basis the qualifications of the above-captioned applicants so that the Commission can determine for itself which is better qualified. In this connection, it should be noted petitioner's principals are local residents who have broadcast experience in the area and who propose a significant degree of integration. On the other hand, Mighty-Mac's principals are from the Lansing, Michigan area, far removed from the proposed service area, and without any previous broadcast experience there. It certainly would not be in the public interest to permit an "allocations" freeze having no relevance to the factual situation here present to prohibit the Commission from making a comparative determination between applicants requesting the identical frequency.

5. The premises considered, it is respectfully requested that petitioner's application be accepted for filing.

Lake Broadcasters, Inc.

By /s/ Samuel Miller

* * *

July 31, 1962

This is to certify that I have served by mail on July 31, 1962 a copy of the foregoing upon Mighty-Mac Broadcasting Company, 259 W. Grand River Avenue, E. Lansing, Michigan.

/s/ Samuel Miller

[11]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

FCC 62-1052
25490

In the Matter of)
)
Interim Criteria to Govern)
Acceptance of Standard)
Broadcast Applications)

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Hyde dissenting and issuing a statement; Commissioner Henry not participating.

The Commission has before it for consideration numerous petitions and letters seeking reconsideration of the Commission's action of May 10, 1962, (FCC 62-516, 23 R.R. 1545) establishing a temporary, limited halt in the acceptance of standard broadcast applications. 1/ In addition, the Commission has before it numerous applications tendered after May 10, 1962, accompanied by petitions or letters requesting reconsideration of the interim criteria. 2/ Since, in many cases, petitions nominally seeking waiver of the rule have challenged its legality, the Commission is considering here all requests for reconsideration or waiver received by June 15, 1962. The various

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1/ A single petitioner, the Federal Communications Bar Association, has also requested that the Commission stay the effectiveness of its order pending decision on the petitions for reconsideration and has requested oral argument before the Commission, en banc. The Commission does not believe that oral argument will materially assist in the resolution of the issues now before us and will deny the request. Moreover, since we have not taken dispositive action with regard to any application conflicting with an application filed by a petitioner herein, we have seen no need to stay the effective date of our Order.

2/ These applications are all inconsistent with the interim criteria and fall into one or more of four major categories:

(a) Applications tendered prior to May 15, 1962, the date copies of the May 10th Report and Order were filed with the Nat-

ional Archives and Record Service and made available for public inspection.

(b) Applications filed on or before May 25, 1962, involving substantial interference with applications listed in the Commission's Public Notice, FCC 62-419, "cut-off list" number 33.

(c) Applications involving substantial interference conflicts with proposals filed on or before May 10, 1962, which proposals have not yet received "cut-off" protection pursuant to Sections 1.354 and 1.106 of the Rules.

(d) Applications not involving substantial interference conflicts with any proposal filed on or before May 10, 1962.

[12]

letters, petitions, responsive pleadings and applications involved are set forth in the Appendix to this Opinion.[3/]

2. The contentions advanced in the various pleadings may be divided into three general groups. In the first group are the various arguments to the effect that the Commission's action was, in whole or in part, unlawful. Secondly, several petitioners contend that, apart from questions of legality, the interim criteria should be modified or changed in one or more respects. Finally, nearly all petitioners contend that, should the Commission leave the interim criteria undisturbed, the rule should be waived in view of particular compelling reasons present in each case. Having considered the contentions advanced, we conclude, as set forth more fully below, that (a) the Commission's action was not unlawful, (b) no justification exists for the requested modifications in the interim criteria and (c) all applications not consistent with the interim criteria must be returned to the applicants.[4/]

LEGALITY OF THE REPORT AND ORDER

3. Petitioners' contentions that the interim criteria are unlawful in whole or in part are, essentially, divisible into three sub-categories. It is claimed, first, that the May 10th Report and Order was not adopted in accordance with applicable statutory law and is therefore wholly ineffective; second, that the effective date of the amended rules was earlier than allowed by law; and, finally, that the amended rules cannot

be made effective as to certain applicants involving conflicts with other applications filed on or before May 10, 1962. The Commission has carefully considered each of the contentions above and has concluded that each must be rejected.

4. The most basic attack mounted against the May 10th Report and Order is the contention that the Commission's action was "substantive" rather than "procedural" and that, therefore, the rule changes could not be effected without full compliance with the formal rulemaking requirements of the Administrative Procedure Act, Section 4. [5/] Except for the statement that certain potential applicants will be denied "Ashbacker rights" -- a

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[3/] One applicant, Cape Canaveral Broadcasters, Inc., has also filed a petition to deny a competing application which was on file prior to May 10, 1962. The Commission will adhere to its usual practice and will consider this petition when the application at which it is directed is considered in normal course.

[4/] One petitioner, Paul E. Taft d/b as Taft Broadcasting Company, has claimed that its tendered application seeks only a "minor change" and, therefore is not barred by the freeze. Examination of the application, which seeks to increase power from one to five kw, indicates that the change sought is a major one. Accordingly, we consider Taft's "contingent" request for waiver herein.

[5/] The Administrative Procedure Act, 5 U.S.C. §1003, sets forth requirements as to notice of proposed rulemaking, procedures for adoption of rules, and the prerequisites to effectiveness of rules so adopted. However §1003(a) specifically exempts "rules of agency. . . procedure and practice" from the notice requirements and §1003(c), dealing with the effective date of newly adopted rules, refers only to "substantive" rules. In our Report and Order of May 10th, we stated that "the interim procedures set forth in the appendix hereto relate to matters of practice and procedure before the Commission. . ."

contention we will discuss separately herein -- no authority has been cited in support of this view. Instead, petitioners assert generally that the Commission's action has "a substantial and important impact" on private and public interests [6/] and dwell at length upon the effect of the

Commission's action on particular applicants, rather than upon the nature of the action itself.

5. It is an inescapable fact that some private interests will be affected by almost any rule change, procedural or substantive. It has been recognized by the U.S. Court of Appeals for the District of Columbia, however, that the effect of a particular rule change on individual parties does not determine the categorization of the action involved. In Radio Cabrillo v. F.C.C. 294 F2d 240 (D.C. Cir. 1961), the Court sustained the Commission's cut-off rule [7] against an attack similar to that made here, noting specifically that:

> . . .all procedural requirements may and do sometimes affect substantive rights, but this possibility does not make a procedural regulation a substantive one.[8]

Thus, the effect of a regulation on particular parties is not a reliable guide in determining whether or not the rule is "substantive". It is necessary, instead, to look at the rule itself.

6. Substantive rules are those which change standards of station assignments and procedural rules are those dealing with the method of operation utilized by the Commission in the dispatch of its business. There is, however, no fixed and immutable standard which would allow us to determine, from the bare words of a particular regulation, whether the rule falls within the first category or the second. The determinative factor is the context within which the rule was promulgated and, flowing from this context, the essential purpose of the rule. Viewing the interim criteria in terms of these factors, it is clear that the purpose of the "freeze" was not the establishment of new allocation standards without public participation in rule making but, to the contrary, the creation of conditions under which formal rule making proceedings can be held in an effective, efficient, and meaningful manner. In the Report and Order adopting the interim criteria, we noted explicitly that the deterioration situation in standard broadcast allocations would require a formal rule making proceeding. We also recognized, however, that such a rule making proceeding, possibly of extended duration, could have little meaning

if we continued to allocate new stations under the old rules, thus intensifying the very problems our rule making sought to remedy. In this specific context, the

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6/ FCBA Petition

7/ Sections 1.106, 1.354, and 1.361 of the Commission's Rules

8/ Radio Cabrillo, supra, at 244

Commission concluded that a temporary limited halt in the acceptance of standard broadcast applications was a necessary adjunct to any efficient and effective rule making. We believe the manner in which we chose to meet anticipated problems surrounding our rule making proceeding represented a necessary and proper exercise of our discretion in this area.[9] Since the interim criteria created no new station assignment standards but were, rather, primarily concerned with the effective functioning of Commission processes, the AM "freeze" was procedural in nature and not subject to the formal rule making requirements of the Administrative Procedure Act.

7. The second major contention advanced by various petitioners and applicants is that, assuming the rule change to be procedural, the rule could not be effective as to any applicant filing prior to publication in the Federal Register.[10] In support of this view, petitioners cite Section 3 of the Administrative Procedure Act (5 U.S.C. §1002), and the Federal Register Act, 44 U.S.C. §307. Section 3 of the Administrative Procedure Act provides, in relevant part:

> Every agency shall separately state and currently publish in the Federal Register . . . (2) statements of general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available as well as forms and instructions as to the scope or contents of all papers, reports, and examinations; . . . No person shall

in any manner be required to resort to organization or procedure not so published.

The Federal Register Act, 44 U.S.C. §307, states:

> No document required under Section 305(a) of this title to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate original or certified copies of the Document shall have been filed with the Division and a copy made available for public interest as provided in Section 302 of this title.

Petitioners contend that the sections cited above render nugatory the May 10th, 1962, effective date we had assigned the interim criteria and that, accordingly, the earliest possible effective date was May 15, 1962.

9/ The Court of Appeals, in Radio Cabrillo, supra, observed that the Commission's "cut-off" rule had been developed to meet problems created by the Ashbacker doctrine and that "the manner of coping with the difficulty lies within the discretion of the Commission, so long as its solution is reasonable." Radio Cabrillo v. F.C.C. 294 F 2d 240, 244 (D.C. Cir. 1961). Paragraphs 11-14, infra, consider the reasonableness of the freeze as applied to particular applicants.

10/ The Report and Order was filed for publication with the Federal Register at 8:45 a.m., May 15, 1962.

[15]

8. The Commission agrees that publication of the May 10th Report and Order was required under the statutes cited above. We do not agree, however, that publication was a precondition to effectiveness with regard to any of the few applicants who tendered substantially complete applications prior to May 15, 1962. At 3:00 p.m. on May 10, 1962, the Commission made available for distribution at its offices the complete text of the Report and Order adopted earlier that day. In addition, a public notice accompanying the full document summarized the Report and Order and quoted, verbatim, the operative sections of the interim criteria. Each of the applications tendered prior to May 15, 1962, now carries with

it some written indication that the applicant, the applicant's attorney, or both, had read at least the public notice prior to the time the application was tendered for filing. Under these circumstances, the Federal Register Act does not preclude effectiveness as to these applicants since the Act, as quoted above, equates "actual knowledge" with publication as a precondition to effectiveness with regard to a particular party. Nor do we believe that Section 3 of the Administrative Procedure Act requires a different result. The Administrative Procedure Act contains no independent definition of "publication." The purpose of Section 3(a), however, is essentially the same as that underlying the Federal Register Act -- i.e., making information available to the public, particularly in areas where actions of government agencies affect private interests. In light of this essential identity of underlying policy, it appears most reasonable to consider the publication requirements of Section 3(a) of the Administrative Procedure Act as defined by the earlier statutory language contained in Section 307 of the Federal Register Act. Thus read, the actual knowledge of the applicants here involved becomes determinative and they cannot be held to have been required to resort to "unpublished" procedure. See Eastern Air Lines v. Union Trust Company 95 U.S. App. D.C. 189, 221 F2d 62, (D.C. Cir. 1955).

9. A single petitioner, WLOD, Inc., (WLOD) has raised a different argument with regard to the effective date of the interim criteria. WLOD contends that Section 408 of the Communications Act prohibits the Commission from issuing any "order" to be effective in less than thirty days. Section 408, in relevant part, reads as follows:

> Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days after service of the order, and shall continue in force until its further order or for a specified period of time, according as shall be prescribed in the order, unless the same be suspended or modified or set aside by the Commission, or set aside by a court of competent jurisdiction.

WLOD's reliance on Section 408 is mistaken. This Section, as well as Section 407, which must be read concurrently with 408, was incorporated from the Interstate Commerce Act in 1934. The section was, in our opinion, intended to apply

[16]

only to cases in which an order has been directed at a specific party,[11/] and, during the past twenty-eight years, Section 408 has been so applied. The wording of the section itself reinforces this interpretation inasmuch as it bars effectiveness sooner than "thirty days after service of the order." Accordingly, we conclude that Section 408 does not apply to an "order" effecting a change in procedural rules of general applicability.

10. The final challenge to the legality of the freeze order comes from those petitioners tendering applications claimed to be mutually exclusive with other proposals filed prior to May 10, 1962, which latter applications had not yet been afforded "cut-off" protection under previously applicable Commission Rules. These applicants claim that rejection of their proposals will contravene the mandate contained in Section 307(b) of the Communications Act, since the applications now tendered may well represent a more efficient distribution of radio service than mutually exclusive proposals already on file. Moreover, these petitioners contend, failure to accept their applications and consolidate them for hearing with the mutually exclusive proposals on file will deprive the petitioners of "Ashbacker rights."

11. The Commission does not accept these contentions. We have noted earlier that the interim criteria of May 10, 1962 represented procedural rule changes made necessary by a forthcoming standard broadcast rule making proceeding. Since the rule change is a procedural one, the fact that some potential applicants may be substantially affected does not determine the propriety of the action. The real question raised by the group of applicants here considered is whether or not the procedural changes embodied in the interim criteria are reasonable ones. We believe, as set forth more fully below, that the rule changes were reason-

able and that the particular form they assume is necessarily related to the discharge of our statutory obligations.

12. As explained in paragraph 6, supra, the Commission concluded that a meaningful rule making proceeding concerning standard broadcast assignment could not be held if we continued to accept and grant, at the same time, applications which would only aggravate the very problems we were trying to solve. Having reached this initial conclusion, it became necessary to determine the nature and extent of the "freeze" necessary to accomplish our objectives. Upon an analysis of all pending applications, we concluded that the total number of potential grants that could result from proposals on file, (excluding Class IV power increases), was not sufficiently great to frustrate the ends we sought to accomplish through our rule making. We decided, therefore, that we could continue to process applications on file, recognizing the

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11/ Apparently a specific common carrier. Cf Section 407, which complements 408 in certain respects and which specifically applies to "a carrier."

[17]

equitable considerations inherent in those cases, without substantial sacrifice of our basic objectives.12/ At the same time, however, we recognized that any further acceptance of new applications would raise the number of grants to an intolerable level and, accordingly, it was concluded that we must exercise our administrative discretion so as to bar such new applications.13/ It was further concluded that if a freeze were to be put into effect it must be done without delay since, on the basis of past experience, it was expected that any substantial postponement would result in a flood of several hundred hastily prepared applications. Therefore, we amended our procedural rules to establish, in effect, a new "cut-off date" for most pending applications, this new date acting to supersede all previous cut-off lists.

13. Only in this specific context can we properly consider petitioners' arguments based on Section 307(b) of the Communications Act. Section 307(b) requires that "the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." In the standard broadcast service, Section 307(b) has most often been invoked in the past when it has been necessary to choose between competing applications proposing mutually exclusive operations with substantially different service areas. Utilization of 307(b) in this relatively narrow "adjudicatory" sense, however, must not be allowed to obscure the fact that the Commission has an even greater obligation to develop an overall plan under which stations are assigned at any particular time so as to insure a "fair, efficient, and equitable distribution" of facilities.[14/] It

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12/ It is clear that the Commission could have taken an alternative route and simply withheld action on all standard broadcast applications during the pendency of this rule making proceeding. See Harvey Laboratories, Inc. v. F.C.C. United States, 289 F2d 458 (D.C. Cir. 1961), which upheld an extensive, but reasonable delay in acting upon an application owing to the "freezes" occasioned by pending NARBA ratification, the Daytime Skywave proceedings, and the Clear Channel proceedings. The rules under which action was deferred pending completion of the latter two proceedings were adopted as procedural regulations, without notice of rule making. See the Commission's Order of December 4, 1950, 15 F.R. 9065. See also Mesa Microwave Inc. v. F.C.C., 105 U.S. App. 1, 262 F2d 723 (D.C. Cir. 1958).

13/ Several defined categories of applications were excepted from the freeze on the ground that their acceptance could in no way frustrate the objectives we seek to accomplish through our rule making. See the Report and Order adopting the interim criteria, 23 RR 1545, 1547.

14/ It is well settled that the Commission may narrowly limit the range of adjudicatory activities in the allocation field through use of the general rule making powers. See Logansport Broadcasting Corporation v. United States 93 U.S. App. D.C. 342, 210 F2d 24 (D.C. Cir. 1954).

is precisely because we have found an urgent need to re-examine the regulations which produce our overall plan of assignment that it has been necessary to institute a proceeding looking toward revision of the AM rules.

14. Several applicants contend, however, that acceptance of their proposals would not add to deterioration of the AM service since they wish to file proposals mutually exclusive with applications already on file. Thus, these petitioners argue, the total number of possible grants would not be increased. This argument is not borne out by the facts. The petitioners advancing this particular argument have failed to consider the inevitable development of "chains" of interlinking mutually exclusive proposals. The chain problem is far from a fanciful possibility, a fact which must be acknowledged by anyone familiar with recent hearing proceedings involving groups of twenty or more applications spread over wide areas of the country, linked together by interference considerations.[15/] The following examples are illustrative of the type of problem to be anticipated if we were to accept new applications "mutually exclusive" with proposals already on file.

(a) A was on file prior to the freeze and B seeks to file an application after May 10, 1962, for a new facility in a different city but on the same frequency as A. Are A and B mutually exclusive? It is often impossible to determine, prior to hearing, whether two applications for different communities are "mutually exclusive". Many applications resulting in some degree of mutual interference are granted concurrently under our present rules. Thus, it may be impossible to predict, when B tenders his application, whether its acceptance would result in two grants rather than one.

(b) A was on file prior to the freeze. Prior to A's cut-off date, B and C file applications for stations on the same (or adjacent) frequency as A, but in different cities. B and C may prove to be "mutually exclusive" with A but not with each other,

again raising the possibility of mutiple grants where one had been possible before.

(c) A and B, both on file before the freeze, propose mutually exclusive operations in different cities. C , filing after the freeze, proposes a new facility in A's city, but utilizes a different directional antenna pattern (or lower power) so that the C proposal is not mutually exclusive with B's. It is now possible

15/ See, e.g., Community Service Broadcasters, Incorporated, et al, (FCC 61 1204); Saul M. Miller, et. al (FCC 61-1473).

[19]

to grant both C and B, rather than A or B. Thus, even though C has applied for a station in the same city as A, it is still possible to increase the number of potential grants.

(d) A, an applicant filing prior to the freeze, may not possess all requisite qualifications. Acceptance of B's application makes possible a new grant where there would have been none upon denial of A's application, even when B applies for facilities identical to those sought by A.

The examples given above have been reduced to their simplest terms for purposes of illustration. In practice, it is to be expected that these problems would often occur in combination and attain considerable complexity. Confronted with these possibilities, and having decided that we will continue to process applications filed prior to May 10, 1962, the Commission concludes that the only reasonable and effective means of accomplishing our objectives is to bar all applications tendered after May 10th which are not consistent with the interim criteria.

15. The Ashbacker case[16/] has been cited by most petitioners as a further ground compelling acceptance of applications mutually exclusive with proposals on file. We do not believe the case is in point. In Ashbacker, the Supreme Court held that a hearing is required between

two co-pending, mutually exclusive applications and that the Commission's action granting the first of the two applications without hearing must be set aside. It is important to note, however, that Ashbacker was concerned with two applications which were already on file with the Commission. The Supreme Court noted expressly that:

> Apparently no regulation exists which, for orderly administration, requires an application for a frequency previously applied for, to be filed within a certain date.

The recent decision of the U.S. Court of Appeals in Radio Cabrillo v. F.C.C., 294 F2d 240 (D.C. Cir. 1961), demonstrates that when a reasonable regulation establishing a "cut-off" date does exist, no "Ashbacker rights" arise on the part of a late filing applicant. The Commission believes that the regulation adopted on May 10, 1962, was a reasonable one under the circumstances, and a necessary correlative to the forthcoming standard broadcast rule making proceeding.

16. The discussion above is applicable to all parties tendering applications after May 10th, who claim mutual exclusivity with other applications filed before that date. It is necessary to give special consideration, however, to an additional argument advanced by the limited group of petitioners

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16/ Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945).

claiming conflicts with applications on the Commission's "cut-off list" number 33, released April 19, 1962, listing applications ready and available for processing on May 25, 1962, (hereinafter the "May 25th list"). These petitioners assert that the Commission's action changing the effective cut-off date to May 10th was arbitrary, capricious, and contrary to principles set forth by the U. S. Court of Appeals in Ridge Radio Corporation v. F.C.C. 110 U.S. App. D.C. 277, 292 F2d 770 (1961). Several variants of this argument have been submitted: the first to the effect

that the freeze is ineffective as to any applicant filing prior to May 25th, since the cut-off list was, in effect, a representation that the Commission would accept applications until at least that date; the second that the freeze is ineffective as to any applicant having a potential conflict with an an application on the list. (The latter contention is based upon the possibility of the pre-May 25th filing of an application or applications which would act to link a proposal on the list with petitioner's proposal, itself not in conflict with the listed proposal.)

17. This argument may only be evaluated upon a comparison of the problems giving rise to the "cut-off" rule with the circumstances compeling us to impose the present "freeze." The rules establishing the cut-off list procedure were adopted at a time when the Commission's processes were becoming hopelessly clogged with late filing standard broadcast applicants seeking comparative consideration with prior-filed applications pursuant to the Ashbacker doctrine.[17/] The primary purpose of the rules was to enable the Commission to clear the logjam of applications threatening to paralyze our processes, (and not, as petitioners appear to infer, to confer new private rights on potential applicants.) [18/] The present freeze, on the other hand, resulted from an entirely different set of problems which, we believe, are of transcending importance. As we have noted at some length, these problems concern the adequacy of the basic rules under which we discharge our allocations function in the standard broadcast field. In view of the importance of the issues involved, we concluded that we must suspend our normal procedures concerning the acceptance of applications. This action was far from "arbitrary and capricious," but, in the present context, a completely necessary measure directly linked to the discharge of our statutory obligations.

17/ For a discussion of the tremendous processing problems confronting the Commission at the time the cut-off procedure was adopted, see the Report and Order amending Sections 1.106, 1.354, and 1.361 of the Rules, 18 RR 1565 (1959).

18/ In the Report and Order adopting the cut-off procedure we noted specifically that the cut-off date set by public notice was not necessarily the final date upon which a competing application could be filed. We stated:

> "Thus, the date fixed by the Public Notice is no guaranty that an application will be entitled to consideration with listed applications if filed by that date, but rather is the last possible filing date for comparative consideration even if the earliest filed application has not been acted upon by that time. Potential applicants, as in the past, must be guided in their decisions as to filing their applications by the public notices of the acceptance for filing of competing applications and the status of the processing line." 18 RR 1565, 1567

[21]

18. Ridge Radio does not require a different result. In Ridge it was held only that the particular form of a cut-off notice then employed by the Commission was defective, inasmuch as it failed to advise a potential applicant that proposals involving an indirect conflict with a listed application must be filed by that application's cut-off date. No such question is involved in the present case. It is clear that, pursuant to Sections 1.361(c) and 1.354(c) of the Rules, any application listed on the May 25th list could have been granted or designated for hearing on or before May 10, 1962. Since the freeze order was, in effect, an equivalent action, reasonably related to a specific public interest objective, we do not believe that the particular group of petitioners here considered has suffered the loss of any legal right.19/

REQUESTED MODIFICATIONS IN THE INTERIM CRITERIA

19. Several petitioners have submitted alternative requests that the interim criteria be modified to some degree. For the most part, these requests for partial reconsideration seek additional categories of exception for those applications in direct, indirect, or potential conflict with one or more applications on file before the freeze. These requests will be denied for reasons similar to those given in the preceding paragraphs. A single petitioner, Radio Orange County, Inc., has requested

that the interim criteria be modified to permit acceptance of applications for improved facilities by Class II stations operating on Class I-B channels. Radio Orange submits that the Commission's "Further Supplement" to the Clear Channel Decision removed restrictions as to certain applications by Class II stations on I-B channels and constituted an "invitation" to file such applications for much needed improvements in existing facilities. The Commission does not feel that petitioner's position is essentially different than that of most potential applicants. The interim criteria represent a temporary measure to be kept in effect during the pendency of rule making proceedings looking toward revision of the AM rules. Radio Orange, and other potential applicants in the same position, will be able to file its application following conclusion of the rule making proceeding if the application is consistent with the standard broadcast rules then put into effect.

REQUESTS FOR WAIVER

20. Nearly every petitioner tendering an application has submitted a request for waiver of the interim criteria. In general, the requests are based upon one or both of the following reasons:

19/ Our conclusions above would also dispose of the contentions advanced by petitioners claiming potential conflicts with proposals on the May 25th list, or claiming that any application filed prior to May 25th must be accepted. We wish to make it clear, however, that even if we were to accept applications mutually exclusive with May 25th proposals, we would not accept any other applications not involving an actual direct or indirect conflict with a listed application. It is our opinion that petitioners claiming only potential conflicts are in no different position than any other applicant whose arguments for acceptance are in no way based on the May 25th list.

[22]

(a) The petitioner has invested substantial amounts of time and money in the preparation of a tendered application. The application was nearly complete when the freeze went into effect.

(b) The tendered application proposes a much needed service, though not complying with any of the exceptions to the freeze

listed in the interim criteria. Failure to accept the application will result in great hardship in a particular community.

21. We have carefully considered each of the requests for waiver and have concluded that each must be denied. The present freeze rule is one which has as its basis policy considerations of the utmost importance. It is our opinion that these policy considerations are such as to override the usual equities presented as grounds for waiver. A detailed examination of each waiver request considered herein has convinced us that, accepting the various factual allegations of petitioners as true, insufficient grounds have been set forth to justify waiver of the rule in any of the cases herepresented. See United States v. Storer Broadcasting Company, 351 U.S. 192 (1956). We note additionally that the grant of any one of the waiver requests involved here would not be justifiable vis-a-vis most of the others since the factual gradations between the cases are generally small.[20/] To embark upon a wholesale grant of waiver requests would obviously destroy the ends we sought to accomplish in adopting the interim criteria. We feel that what we said in the May 10th Report and Order in connection with the practice of granting individual waivers of Section 3.28(d)(3) of the Rules is equally pertinent here:

> Beyond the exceptions, an ever-increasing number of non-engineering factors has been found to justify waiver of the Rule in individual cases, each of which has been added to the body of precedent that inextricably merges with the Rule itself as it is applied in subsequent cases. The result has been a developing system of assignments that may be justified in terms of each individual case, but which, on the whole, bears little relation to the rational assignment system represented by the protected contour concept in undiluted form.[21/]

In short, insofar as the requests for waiver are based upon the private hardship of the petitioner, we cannot, in view of our overall obligation to serve the public interest, make further exceptions; insofar as the re-

quests are based upon a public need, we feel it necessary to delay fulfillment of that

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20/ In addition to the petitions and letters requesting waiver listed in the attached appendix, numerous additional requests have been received since June 15, 1962 - - the cut-off for petitions considered in this opinion.

21/ 23 RR 1545, 1547. (1962)

need in individual cases so that a better overall plan for assigning standard broadcast stations in the public interest may be devised. We believe that we must consider the totality of our obligations in connection with any requests for waiver and viewing the requests in this perspective, we conclude that each must be denied.

CONCLUSIONS

In view of the foregoing, IT IS ORDERED that the petitions and requests listed in the attached Appendix, which seek reconsideration and/or waiver of the interim criteria adopted May 10, 1962, ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Acting Secretary

Attachment

Adopted: October 10, 1962

Released: October 15, 1962

*See attached dissenting statement of Commissioner Hyde

APPENDIX

A. Petitions for Reconsideration of the Report and Order of May 10, 1962, (FCC-62-516) filed prior to June 16, 1962, and unaccompanied by a tendered application:

(1) Federal Communications Bar Association: "Petition for Reconsideration, Request to Set Aside Action Taken By It and/or To Stay Effectiveness of Its Order, and Request for Oral Argument" Filed May 25, 1962.

(2) Raymond I. Kandel: "Petition for Reconsideration." Filed June 11, 1962.

B. Applications tendered prior to June 16, 1962, which are inconsistent with the Interim Criteria adopted by the Report and Order of May 10, 1962, (FCC-62-516) and which are accompanied by petitions or letters seeking reconsideration and/or waiver of the Interim Criteria:

Key to Symbols:

* Application tendered prior to May 15, 1962.

\+ Claimed that application is mutually exclusive with an application filed prior to May 10, 1962.

++ Claimed that application is mutually exclusive with an application filed prior to May 10, 1962, and listed on Public Notice FCC-62-419, "the May 25th cut-off list."

(1) James D. Brownyard * +

(a) Application for new station at North East, Pennsylvania, tendered May 14, 1962.

(b) Letter, submitted with application, requests acceptance despite non-compliance with interim criteria.

(2) George W. Burwell, et al d/b as Triangle Electronics +

(a) Application for new station at Selma, North Carolina, tendered May 25, 1962.

(b) "Petition of Triangle Electronics for Acceptance of Application for Filing," submitted same date.

(3) Cape Canaveral Broadcasters, Inc. ++

(a) Application for new station at Eau Gallie, Florida, tendered May 25, 2962.

[25]

(b) "Petition for Acceptance of Application for Filing, for Waiver of Section 1.354 and/or Reconsideration of Order Amending said Section, and for Other Relief," submitted same date.

(c) Opposition to petition above, filed June 5, 1962, by R. A. Vaughn and Thomas R. Hanssen, d/b as Vaughn-Hanssen Company.

(d) Reply to Opposition, submitted June 14, 1962, by petitioner.

(4) Capital Broadcasting Corporation

(a) Application for new station at Barnesville, Ohio, tendered May 15, 1962.

(b) "Petition for acceptance of application," submitted same date.

(5) Frederick Eckhardt d/b as Mansfield Broadcasting Company

(a) Application to change frequency of station WCLW, Mansfield, Ohio, tendered June 15, 1962.

(b) Petition requesting reconsideration or waiver of the interim criteria, submitted June 15, 1962.

(6) Gold Sonics Incorporated ++ *

(a) Application for a new standard broadcast station at Midland, Texas, tendered May 11, 1962.

(b) Letter from applicant's attorney requesting reconsideration or waiver of the interim criteria, submitted same date.

(7) Good Music Broadcasting Company

(a) Application requesting increase in power and change in site for Station WKTX, Atlantic Beach, Florida, tendered June 8, 1962.

(b) "Petition for acceptance of application for filing, and waiver of Section 1.354 and/or reconsideration of Order, amending said Section and other relief," submitted same date.

(8) F. K. Graham tr/as Coast Broadcasting Company

(a) Application to increase the daytime power of Station WGOO, Georgetown, South Carolina, tendered June 15, 1962.

(b) "Petition of Coast Broadcasting Company for acceptance of application for filing," submitted same date.

[26]

(9) Arthur Griener and G. W. Winter ++

(a) Application for a new station at Palmyra, Pennsylvania, tendered May 25, 1962.

(b) Letter from applicant requesting waiver of the interim criteria.

(10) Heart of Georgia Broadcasting Company, Inc. +

(a) Application for a new standard broadcast station at Gordon, Georgia, tendered May 17, 1962.

(b) Letter from applicant's attorney requesting reconsideration or waiver of the interim criteria, submitted same date.

(11) Indianola Broadcasting Co.

(a) Application for a new standard broadcast station at Indianola, Mississippi, tendered May 25, 1962.

(b) Letter from applicant's attorney requesting waiver of the interim criteria, submitted same date.

(12) Robert A. Jones and Loyd Burlingham d/b as McHenry County Broadcasting Company.

(a) Application for a new standard broadcast station at Woodstock, Illinois, tendered May 16, 1962.

(b) Letter accompanying application stating intention to file petition for reconsideration, submitted same date.

(c) "Petition for acceptance of application," submitted June 25, 1962.

(13) Joseph J. Kessler tr/as WBXM Broadcasting Company

(a) Application for a new standard broadcast station at Springfield, Virginia, tendered May 25, 1962.

(b) "Petition for acceptance of application," submitted same date.

(c) "Petition for partial reconsideration," submitted June 15, 1962.

[27]

(14) Keyser Broadcasting Corporation ++

(a) Application for a new standard broadcast station at Keyser, West Virginia, tendered May 23, 1962.

(b) Accompanying letter and statement requesting waiver of the interim criteria.

(15) Reuben B. Knight +

(a) Application for a new standard broadcast station at Wichita Falls, Texas, tendered May 18, 1962.

(b) Letter from applicant's attorney requesting waiver of the interim criteria, submitted same date.

(16) L&S Broadcasting Company

(a) Application for a new standard broadcast station at Jacksonville, North Carolina, tendered June 12, 1962.

(b) "Petition to accept application for filing, and for waiver of Rule 1.534," submitted same date.

(17) Meramec Valley Broadcasting Company

(a) Application for a new standard broadcast station at Sullivan, Missouri, tendered June 11, 1962.

(b) "Petition for acceptance of application for filing, for waiver of Section 1.354 and/or reconsideration of order, amending said Section and/or for other relief," submitted same date.

(18) Oconee Broadcasting Co., Inc.

(a) Application to increase power of Station WGOG, Wallahalla, South Carolina, tendered June 13, 1962.

(b) "Petition to accept application for filing," submitted same date.

(19) Platinum Coast Broadcasters Inc. ++

(a) Application for a new standard broadcast station at Eau Gallie, Florida, tendered May 24, 1962.

(b) Letter from applicant's attorney requesting waiver of the interim criteria, submitted same date.

[28]

(c) Opposition to request for waiver, submitted June 5, 1962, by R. A. Vaughn and Thomas Hanssen d/b as Vaughn-Hanssen Company.

(d) Reply to opposition, submitted June 13, 1962.

(20) Portage Broadcasting Company *

(a) Application for a new standard broadcast station at Portage, Michigan, tendered May 14, 1962.

(b) "Petition of Portage Broadcasting Corporation for acceptance of application for filing," submitted same date.

(c) Supplement to petition above, submitted May 17, 1962.

(21) Radio Orange County Inc.

(a) Application for increase in power of Station KEZY, Anaheim, California, tendered May 17, 1962.

(b) "Petition for acceptance of application," submitted same date.

(c) "Petition for partial reconsideration," submitted June 6, 1962.

(22) Radio Rockford Inc.

(a) Application to change site, antenna pattern, and add nighttime operation, tendered May 25, 1962.

(b) Letter from applicant's attorney requesting waiver of the interim criteria, submitted same date.

(23) Seminole Broadcasting Company

(a) Application to increase power and to install directional antenna for Station WSWN, Belle Glade, Florida, tendered June 8, 1962.

(b) "Petition for waiver of Section 1.354 of the Commission's Rules and Regulations, and request for acceptance of application for filing," submitted same date.

(24) Paul E. Taft d/b as Taft Broadcasting Company *

(a) Application to increase power of Station KODA, Houston, Texas. tendered May 14, 1962.

(b) "(Contingent) petition for waiver of Rule 1.354(b)," submitted same date.

[29]

(25) Tri-State Broadcaster's +

(a) Application for new standard broadcast station at Sioux Center, Iowa, tendered June 1, 1962.

(b) "Petition for waiver," submitted same date.

(26) WLOD Inc. +

(a) Application to increase the power of Station WLOD, Pompano Beach, Florida, tendered June 11, 1962.

(b) "Petition for waiver of Section 1.354 of the Rules, and acceptance of application," submitted same date.

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[30]

DISSENTING STATEMENT OF COMMISSIONER ROSEL H. HYDE

I dissent to the Memorandum Opinion and Order denying the petitions and other requests for reconsideration of the Commission's Report and Order of May 10, 1962 (FCC 62-516) in the matter of "Interim Criteria to Govern Acceptance of Standard Broadcast Applications."

The order of May 10, 1962, was issued without notice of proposed rule making and was made effective the date of issuance, affording no opportunity for consideration of views of interested parties as to the merit of the order and no advance notice as to its effective date. The Order said that the new rules related to matters of practice and procedure and that notice and rule making in accordance with the Administrative Procedure Act were not required.

The petitions to reconsider which have been filed refer, among other matters, to a number of applications which were prepared or were in process of preparation in reliance upon criteria which had been in effect for many years. They represent substantial investments in funds and efforts. However, under the new "interim criteria" they are summarily rejected. Each applicant is told that the rejection is without prejudice to resubmission when the interim criteria are no longer in effect provided the proposal would be consistent with substantive rules then in force. No notice of proposed rule making has been issued looking toward promulgation of such new substantive rules. In the meantime, the Commission will continue to accept and act upon applications which comply with what it terms "interim criteria." Grants thus made may well present engineering obstacles to grants of rejected applications should they later satisfy new rules yet to be devised. The new criteria which the rejected applications failed to meet require in specific terms that new stations with certain exceptions must bring service to relatively underserved areas. This test did not appear in the now superseded rules; it introduces a new standard for allocating new stations. It is substantive in character according to the following definition from para-

graph 6, first sentence of the majority opinion:

> "Substantive rules are those which change standards of allocation and procedural rules are those dealing with the method of operation utilized by the Commission in the dispatch of its business."

The Commission should reconsider its order and comply with the spirit and letter of Section 4 of the Administrative Procedure Act.

FCC 62-1060
24479

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D.C.

* * *

October 10, 1962

Lake Broadcasters, Inc.,
209 Truckey Street
St. Ignace, Michigan

Gentlemen:

Reference is made to your application, tendered July 31, 1962, requesting authority to establish a new standard broadcast station at St. Ignace, Michigan, and to your petition filed concurrently with the application seeking reconsideration or waiver of the interim criteria contained in Section 1.354 of the Commission's Rules.

Insofar as you seek reconsideration of the Commission's Report and Order of May 10, 1962, adopting the interim criteria, and challenge the legality of that action, your petition was not timely filed pursuant to Section 1.191 of the Commission's Rules [now Section 1.84] and Section 405 of the Communications Act of 1934, as amended. It is noted, however that on October 10, 1962, the Commission denied a number of similar petitions for reconsideration involving essentially the same substantive contentions that you have raised in your petition. A copy of the Commission's Memorandum Opinion and Order of October 10, 1962, is enclosed for your information.

In that Opinion, we also considered and denied numerous requests for waiver of the interim criteria. Since the grounds for denial involved general policy considerations and did not turn upon the facts of any particular case, we feel that our reasons there are equally applicable to your own request for waiver and for those reasons, your request will be denied.

Your tendered application is returned herewith as inconsistent with the "NOTE" to Section 1.354 of the Commission's Rules.

BY DIRECTION OF THE COMMISSION

/s/ Ben F. Waple
Acting Secretary

Enclosures:
***

[32]

[Received November 9, 1962, F.C.C.]

*** ***

LAW OFFICES
SAMUEL MILLER
1032 WASHINGTON BUILDING
WASHINGTON 5, D.C.

November 9, 1962

Mr. Ben F. Waple, Acting Secretary
Federal Communications Commission
Washington 25, D. C.

Dear Mr. Waple:

Transmitted herewith is a petition for reconsideration of the Commission's action returning the application of Lake Broadcasters, Inc. for a new standard broadcast station at St. Ignace, Michigan.

The application itself is also resubmitted herewith in triplicate, together with an amendment to the application which you also returned.

Sincerely,
/s/ Mark E. Fields

Enclosure

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[33]

[Received November 9, 1962, F.C.C.]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Application of	)
LAKE BROADCASTERS, INC	)
For construction permit for St. Ignace, Michigan, 940 kc, 1 kw, day	)

PETITION FOR RECONSIDERATION

Lake Broadcasters, Inc. respectfully petitions the Commission to reconsider its action of October 10, 1962, returning the above-captioned application to the applicant (FCC 62-1060, 24479) and

denying applicant's Petition for Acceptance of Application and Waiver of Section 1.354, which had been filed with the application on July 31, 1962. In support thereof, the following is shown:

1. Petitioner's application was one of a large number which were returned to the respective applicants as unacceptable for filing, having been filed after May 10, 1962, when the Commission imposed a "freeze" on acceptance of applications for new standard broadcast stations and major changes in facilities, with certain limited exceptions.

2. Grant of this Petitioner's request for waiver and acceptance of this application for filing would not frustrate or impede any of the objectives sought to be achieved by the Commission's Report and Order of May 10, 1962 (23 RR 1545). As pointed out in Petitioner's original petition, its application is mutually exclusive with an earlier-filed application for the same city on the same frequency, also daytime only (Mighty-Mac Broadcasting Company, BP-15037). The application of Mighty-Mac, which was filed August 14, 1961, and is still on file, has not yet been reached for processing. The Mighty-Mac application is listed on the Commission's "cut-off" list, released November 2, as being available for processing on December 11, 1962 (over a month from now).

[34]

Therefore, grant of this petition for reconsideration and acceptance of Petitioner's application for filing could be accomplished before the Mighty-Mac application is reached for processing, with no delay in the Commission's processing procedures.

3. The first objective sought to be attained by the May 10, 1962, Report and Order is a halt to further AM grants until the Commission can complete its contemplated rule-making proceedings to establish new standards for such grants. However, the May 10, 1962, Report and Order did not call a halt to all further AM grants, as was done in the case of the prior FM "freeze". Instead, the Commission announced that it would not accept any more applications

for filing, but would continue to process all applications which were then on file. As the Commission noted in its Order of October 10, 1962, denying petitions for waiver or reconsideration of the May 10, 1962, Order (FCC 62-1052, 25490) it was "concluded that the total number of potential grants that could result from proposals on file... was not sufficiently great to frustrate the ends we sought to accomplish through our rule-making." (Page 6).

4. Since the Commission has concluded that grant of applications which were pending on May 10, 1962, would be permissible, it is obvious that acceptance for filing and subsequent grant of Petitioner's application would not frustrate the Commission's objectives. Since Petitioner's application is mutually exclusive with an earlier-filed application for the same city, same frequency, no allocation considerations would be affected by granting one rather than the other. Neither involves interference with other pending proposals or existing stations of a significant extent. No combination of grant is possible with one application for St. Ignace which would not be equally possible with the other. Under these circumstances, the public is entitled to have the Commission choose between the two applicants for St. Ignace, and award the grant to the applicant which is better qualified, as shown through comparative consideration of the applications. Denial of this choice would serve no allocation purpose, and, therefore, there is no reason to do so.

[35]

5. In the Commission's 13-page Order of October 10, 1962, the situation presented by Petitioner's application is only referred to once, briefly. On Page 9, Paragraph 14(d), the Commission discusses the case of applications filed after May 10 which seek the identical facilities sought by others filed before the magic date. The reason given by the Commission for refusing to accept for filing such later applications seeking identical facilities is that the earlier-filed

applicant may be found to be disqualified. Such a reason cannot provide any valid basis for denying to an applicant all his rights. In its Order on Page 6, the Commission concluded that all grants which could result from applications on file on May 10 would be permissible. It is inconsistent with that determination to say, three pages later, that the Commission is counting on disqualification of some applications filed before May 10 to protect its allocation policy. Furthermore, the Commission could not base its refusal to accept for filing later-filed applications for identical facilities with those filed before May 10 upon the supposition that such earlier-filed applications would be disqualified. Such a supposition has no basis whatsoever in fact, since the earlier-filed applications here concerned have not even been examined by the Commission. Furthermore, disqualification of an applicant is so rare that the Commission could not state as a matter of statistical probability that a substantial number of the earlier-filed applications would be found to be disqualified. Thus, the reason given by the Commission in Paragraph 14(d) of its October 10, 1962, Order must be without support in law or fact. Since that is the only reference in the Order which covers the situation presented by Petitioner's application, it must be concluded that no valid basis existed for refusing to accept Petitioner's application for filing.

6. Refusal to accept Petitioner's application for filing and to consider it on a comparative basis with the Mighty-Mac application, would deprive Lake Broadcasters, Inc. of its rights under the doctrine of Ashbacker Radio Corp. v. FCC, 326 U.S. 327. Since Petitioner's application was tendered for filing before any action has been taken on the

application of Mighty-Mac, or even before the Mighty-Mac application was available for processing, it is clear that Petitioner is entitled to comparative consideration with that application.

Respectfully submitted,
LAKE BROADCASTERS, INC.
By /s/ Samuel Miller
/s/ Mark E. Fields

* * *

[Certificate of Service]

FCC 63-35
29336

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In the Matter of)
)
Applications returned as unacceptable)
for filing under interim criteria)
governing acceptance of standard)
broadcast applications)

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Hyde dissenting.

1. The Commission has before it numerous petitions concerning the interim criteria now governing acceptance of standard broadcast stations. 1/ Each of the petitions but one seeks reconsideration of the Commission's action returning an application the petitioner had filed subsequent to the AM "freeze" and, to the extent return of the application was based on the Commission's Memorandum Opinion and Order of October 10, 1962, reconsideration of that decision is sought. 2/ One petitioner requests only reconsideration of the October 10th opinion, stating that he has not yet filed an application conflicting with the "freeze" rule, but intends to do so. 3/ The various petitions and responsive pleadings are set out in the attached Appendix.

2. We feel that it would serve no useful purpose to repeat the contentions of the various petitioners questioning the legality of the "freeze" or the wisdom of the Commission's action in adopting the type of rule now in force. No arguments have been advanced by the present group of petitioners that were not discussed and disposed of in our opinion of October 10, 1962. For the reasons stated in that opinion, we reaffirm our adherence to the interim criteria in their present form.

3. Most of the petitions considered here contain alternative requests for waiver of the "freeze" rule. Some of the petitioners make their requests here for the first time and others reiterate requests for waiver once denied. Our position with regard to the waiver requests,

too, must remain essentially the same as that taken on our opinion of October 10th. We noted there that factual gradations between the various cases were generally quite small and stated:

> We have carefully considered each of the requests for waiver and have concluded that each must be denied. The present

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1/ "NOTE" to Section 1.354 of the Commission's Rules, generally referred to as the "AM freeze."

2/ Our opinion of October 10th (FCC 62-1052, 24 R.R. 1540) denied 28 petitions seeking reconsideration of the Commission's action instituting the "freeze" or requesting waiver of the freeze.

3/ Petition of Raymond I. Kandel.

> freeze rule is one which has as its basis policy considerations of the utmost importance. It is our opinion that these policy considerations are such as to override the usual equities presented as grounds for waiver. A detailed examination of each waiver request considered herein has convinced us that, accepting the various factual allegations of petitioners as true, insufficient grounds have been set forth to justify waiver of the rule in any of the cases here presented. See United States v. Storer Broadcasting Company, 351 U.S. 192 (1956).

4. We believe that each of the waiver requests now before us comes within the language quoted above. However, we feel that we should note briefly several new and somewhat inconsistent arguments connected with the waiver requests in the present group of pleadings. Some petitioners appear to feel that, in disposing of a number of requests at the same time, we have failed to consider the merits of each individual case. Other petitions take the opposite tack and, noting that several waivers of the "freeze" have been granted, accuse the Commission of arbitrary action in denying most requests while granting a few others.

5. Neither of these points is well taken. We must state again that every request for waiver received by the Commission has been considered individually. The vast majority of these requests cite reasons for waiver based on various equities which do not, in our opinion, override the policy considerations upon which the interim criteria are based. For convenience, we have treated many requests of this kind in a single document since our disposition of each has been governed by the same principle. The cases in which we have waived the rule, on the other hand, are very few and fall into three well defined categories: situations in which an existing station may be forced off the air through loss of its transmitter site (The LBJ Co., FCC 62-1164, 24 R.R. 530); cases in which applications are filed for a new station to replace a former station which has, for one reason or another, gone off the air, (e.g., Capital Broadcasting, Inc., FCC 62-1324); and rare cases in which no changes in the basic licensed facilities are involved, (Black Hills Radio, Incorporated, FCC 62-1321, change in specified hours, Tri-County Public Service, Inc., FCC 62-992, 24 R.R. 277, deletion of one city from dual city designation.) These cases are clearly not examples of arbitrary action on the Commission's part but, to the contrary, illustrate the fact that we have fulfilled our obligation to examine carefully the merits of each individual case.

6. Finally, we note that several of the present petitioners have requested that their applications be accepted on a "conditional" basis -- e.g., conditioned upon non-violation of whatever future AM rules are adopted, or conditioned upon a finding that some other conflicting applicant, now on file, be found fully qualified. We do not believe that "conditional" acceptance of applications represents good administrative

[42]

practice and, in fact, we have attempted to eliminate this practice insofar as it has existed in the past. See Public Notice, FCC 61-1286, 22 R.R. 299, discontinuing acceptance of "contingent" AM applications.

The present requests for "conditional" acceptance will be denied.

7. In view of the foregoing, IT IS ORDERED, That the various petitions listed in the attached Appendix ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Acting Secretary

Attachments:

Adopted: January 9, 1963
Released: January 11, 1963

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[43]

APPENDIX

Petitions and responsive pleadings considered in this opinion:

(1) Abbeville Radio, Inc.

(a) "Petition for reconsideration of Commission action returning application of Abbeville Radio, Inc., for change in facilities of Radio Station WARI, Abbeville, Alabama", received November 14, 1962.

(2) Altavista Broadcasting Corporation

(a) Petition, received November 14, 1962, for reconsideration of return of Altavista's application pursuant to Memorandum Opinion and Order of October 10, 1962, (FCC 62-1052).

(3) James D. Brownyard

(a) Petition, received November 13, 1962, for reconsideration of return of application pursuant to Memorandum Opinion and Order of October 10, 1962.

(b) Opposition to the petition submitted November 29, 1962, by Greater Erie Broadcasting Co., Inc.

(4) George W. Burwell, Billy R. Kirby & John S. Townsend d/b as Triangle Electronics

(a) Petition, received November 13, 1962, for reconsideration

of return of application pursuant to Memorandum Opinion and Order of October 10, 1962.

(5) Capital Broadcasting Corporation

(a) Petition, received November 14, 1962, for reconsideration of return of application pursuant to Memorandum Opinion and Order of October 10, 1962.

(6) Arthur Greiner & G. W. Winter

(a) Petition, received November 14, 1962, for reconsideration of return of application, pursuant to Memorandum Opinion and Order of October 10, 1962.

(7) Heart of Georgia Broadcasting Co., Inc.

(a) Petition, received November 14, 1962, for reconsideration of return of application pursuant to Memorandum Opinion and Order of October 10, 1962.

(8) Raymond I. Kandell

(a) Petition for reconsideration of Memorandum Opinion and Order of October 10, 1962. (Petitioner states that he intends to file an application, but has not yet done so.)

(9) KVOR, Inc.

(a) Petition, received November 14, 1962, for reconsideration of return of application.

(10) Lake Broadcasters, Inc.

(a) Petition, received November 9, 1962, for reconsideration and return of application.

(b) Opposition to the petition, submitted November 26, 1962, by Mighty-Mac Broadcasting Company.

(11) Radio Orange County, Inc.

(a) Petition, received November 14, 1962, for reconsideration of action returning application pursuant to the Memorandum Opinion and Order of October 10, 1962.

(12) Paul E. Taft d/b as Taft Broadcasting Co.

(a) Petition submitted, November 14, 1962, for reconsideration of return of application pursuant to Memorandum Opinion and Order of October 10, 1962.

(13) 560 Broadcasting Corporation

(a) Petition received November 7, 1962, for reconsideration of return of application, pursuant to Memorandum Opinion and Order of October 10, 1962.

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[45]

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D.C.

* * * * *

January 15, 1963

Samuel Miller, Atty.
1032 Washington Bldg.
Washington 5, D. C.

Lake Broadcasters, Inc.
St. Ignace, Michigan

Gentlemen:

Returned herewith is your application tendered for filing November 9, 1963 for construction permit for a new standard boradcast station to be located in St. Ignace, Michigan.

Preliminary examination of your proposal indicates that the application is not consistent with the interim criteria contained in the "NOTE" to Section 1.354 of the Commission's Rules.

On October 10, 1962, the Commission denied various petitions requesting reconsideration or waiver of the interim criteria adopted by Report and Order of May 10, 1962. A copy of the Commission's Memorandum Opinion and Order of October 10, 1962 is enclosed for your information.

Your application is returned without prejudice to its later resubmission when the interim criteria are no longer in effect, provided, of course, that the proposal would be consistent with the substantive rules in force at that time.

Very truly yours,

Ben F. Waple
Acting Secretary

Enclosures
Application & Exhibits (3)
Orders (2)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAKE BROADCASTERS, INC., Appellant,	)	
v.	)	Case No. 17,595
FEDERAL COMMUNICATIONS COMMISSION, Appellee.	)	

PREHEARING STIPULATION

I. Counsel for Appellant and Appellee hereby stipulate that the issues presented by the above-captioned case are as follows:

1. Did the Commission act arbitrarily and capriciously, and did it deprive appellant of due process of law, when it returned appellant's application without a hearing as provided in Section 309 of the Communications Act?

2. Does the Commission's "freeze" rule, as applied here, violate the doctrine of Ashbacker Radio Corporation v. F.C.C., 326 U.S. 327, that a later application for a frequency

in a particular city is entitled to comparative consideration with an earlier-filed one?

3. Was the Commission's refusal to consider appellant's application on its merits or to consider waiver of the "freeze" when requested, arbitrary and unreasonable in light of the Commission's continued consideration and granting of other applications?

4. Did the Commission commit error in not accepting appellant's application by reason of the Commission's omission to enunciate specific findings of fact and conclusions of law with respect to appellant's assertion that its application was entitled to comparative consideration with BP-15037?

II. Counsel for Appellant and Appellee further stipulate:

1. Appellant will serve and file its brief on or before May 2, 1963, Appellee will serve and file its brief on or before June 3, 1963; and Appellant will serve and file its reply brief, if any, on or before June 17, 1963.

2. The Joint Appendix shall be filed on or before June 17, 1963. References to the record appearing in the various briefs of the parties shall be to the page numbers in the original record certified to this Court in the above-captioned case. In the printing of the Joint Appendix there will be set forth, in addition to the consecutive numbering of the pages of the Joint Appendix, the original record page numbers in bold type and indented in a manner which will render it convenient for the Court to locate the pages referred to in the briefs.

Respectfully submitted,

/s/ Daniel R. Ohlbaum,
Associate General Counsel
Federal Communications Commission

/s/ Mark E. Fields,
Counsel for Appellant
Lake Broadcasters, Inc.

March 19, 1963

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,595

LAKE BROADCASTERS, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal from Memorandum Opinion and Order
and Letter and Report and Order of
Federal Communications Commission

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,595

LAKE BROADCASTERS, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal from Memorandum Opinion and Order
and Letter and Report and Order of
Federal Communications Commission

JOINT APPENDIX

INDEX

[1]

Before the

FCC 62-516
18951

FEDERAL COMMUNICATIONS COMMISSION

Washington 25, D.C.

In the Matter of)
)
Interim Criteria to Govern)
Acceptance of Standard)
Broadcast Applications)

REPORT AND ORDER

By the Commission: Commissioner Hyde dissenting and issuing a statement.

1. The present rules governing assignment of standard broadcast facilities are virtually unchanged from those adopted two decades ago. Between 1945 and 1962, the number of authorized standard broadcast stations has grown from 955 to 3,871, and the fact of this tremendous growth coupled with the particular way in which the growth has occurred, has created problems which differ greatly from those anticipated when the present standard broadcast rules were adopted. As explained more fully in the paragraphs which follow, the Commission believes that an immediate need exists to examine the problems of standard broadcast assignment in fresh perspective. We believe that the time has come to re-study the standards under which we consider new and changed assignments and, as a first step toward this end, we find it necessary to bring a temporary, partial halt to our acceptance of applications for new and changed facilities.

2. To understand the difficulties we face today, it is necessary to refer, briefly, to the evolution of the standard broadcast service as it has developed since the Second World War. Pre-war radio service suffered from what the Commission recognized to be three principal deficiencies: lack of any local outlet in many communities of substantial size, absence of competing local stations in communities

that did have a facility, and substantial "white" areas in the Northeast, Midwest, South, and Far West. Accordingly, the goals the Commission sought to achieve in bringing about the post-war growth of radio were specifically directed toward fulfillment of these three needs. It was always recognized that, to some degree, providing local outlets and fostering competition were objectives inconsistent with the Commission's third aim, that of eradicating "white" areas, but, it was felt that a case-to-case balancing of the competing considerations would result in an assignment scheme reflecting relatively equal achievement in each area.

3. The hope for balanced achievement has not, however, been realized in fact. The standard broadcast service has grown so as to fulfill the Commission's first two objectives to an unexpected degree. A large majority of communities 1/ of 10,000 and over (and many with a population of under 10,000) have their own local outlets. There are few counties in the United States which do not have a choice of multiple signals. Multi-station communities have grown similarly, so that lack of competition in the standard broadcast band can no

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1/ Suburban communities within standard metropolitan statistical areas are not considered separate communities for the purpose of this analysis.

longer be regarded as a serious problem. At the same time, this tremendous proliferation of stations has occurred without significant reduction of "white" areas. The outlying areas which lacked primary service in 1946 have been reduced only a minute degree by the continual flow of new assignments. More than this, concentration upon the creation of multi-station markets has led to a derogation of engineering standards, so that service rendered by existing stations in the outermost regions of their normally protected service areas has been

impaired, future power increases to extend the interference-free contour over growing suburban populations are often rendered impossible, and the available channels for the establishment of new stations in growing underserved areas have been continually reduced in number.

4. In the face of this mounting problem, it becomes necessary to ask ourselves whether the present rules governing assignment of new and changed facilities, and the substantial body of precedent which has become intertwined with many of the rules, frustrate implementation of a more efficient pattern of station assignment. Properly, this question forms the core of the thorough reappraisal of the Standard Broadcast Rules which must become the subject of formal rule-making proceedings. It is possible at this time, however, to delineate at least two areas of major concern.

5. First, certain of the technical rules, entirely adequate when adopted, have lost their practical validity as the number of stations has grown. For example, presently employed RSS exclusion principles for calculating nighttime interference, which are effective if only a few stations enter the RSS limit, become progressively less precise as the number of interfering sources is increased. Again, levels of signal intensity required for residential and business areas of a particular community were predicated upon maintenance of a normally protected contour some distance from the center of the city served. When this contour is not maintained, it may no longer be said with certainty that the signal level required for city service is adequate to insure a sufficient signal under all conditions.

6. Second, and of greater importance, is the fact that, owing to intense concentration upon providing local outlets and competitive services, many of the most crucial standards have been impaired by built-in exceptions and by waivers. The two prime examples of this phenomenon are the rules most basically involved in the steady deterioration of the protected service area concept, i.e., the rules concerning

interference which may be caused and which may be received by an applicant for new or changed facilities. Section 3.24(b) of the Rules provides that a new facility must not cause interference to existing stations unless the need for the new service outweighs the need for the service to be lost. Unfortunately, neither of the factors to be weighed takes into consideration, except most indirectly, the values inherent in maintaining what is ordinarily considered to be an adequate separation between stations. Since, most often in an individual case, a proposed new station will provide a new service to a considerably greater number of persons than reside in the area of interference, interference to existing stations, unless extraordinary in amount, has not been a major factor leading to denial of applications. The rule concerning interference received by a proposed operation has

more directly involved a weighing of engineering considerations against non-engineering factors, again to the detriment of the former. Section 3.28(d)(3) provides that a proposed facility may receive no more than ten percent population loss by reason of interference within its normally protected contour. However, Section 3.28(d)(3) contains several significant exceptions which have permitted numerous grants of proposals receiving interference far in excess of ten percent. Beyond the exceptions, an ever-increasing number of non-engineering factors has been found to justify waiver of the Rule in individual cases, each of which has been added to the body of precedent that inextricably merges with the Rule itself as it is applied in subsequent cases. The result has been a developing system of assignments that may be justified in terms of each individual case, but which, on the whole, bears little relation to the rational assignment system represented by the protected contour concept in undiluted form.

7. The Commission is convinced that the problems discussed above compel us to re-examine, immediately, the standards employed in

assigning new or changed standard broadcast facilities. We propose to issue a notice of proposed rule making which will propose deeper exploration in many of the areas we have mentioned here. We will seek to determine, among other points, whether many technical portions of the rules continue to be useful tools under present conditions; whether many of the rules have been impaired by their built-in exceptions; whether the body of precedent which has grown up about the practice of granting waivers of certain sections has eroded the sections involved; and, as a result of these determinations and others, to what extent revision of the rules and of our practices would be appropriate. It will be necessary to ask basic questions concerning such matters as the present limits employed to define the normally protected contour of the various classes of stations, and to re-examine the concept of what constitutes a "community" for the purposes of allocating local services. Most significantly, we will need to ask whether, under present-day conditions, our station assignment principles should provide at all for a weighing of engineering standards against subjective non-engineering factors.

8. We feel that the first step necessary to permit an undertaking of the magnitude here involved is a partial halt in our acceptance of standard broadcast applications. This step is essential so that we may avoid compounding present difficulties with a continual flow of new assignments based upon existing, possibly inadequate, standards. On the other hand, we believe that procedural fairness requires that we complete processing those applications currently on file, although we take occasion to note, our consideration of these applications must take into account what we have said here and will reflect our desire to avoid unnecessary aggravation of the problems we have discussed. We believe, moreover, that we may continue to accept for filing certain defined categories of applications which would not frustrate the ends we seek to achieve by our re-study, or for which there are strong public interest considerations weighing in favor of acceptance.

Accordingly, the interim processing criteria we adopt today provide for the continued acceptance of certain applications which would bring service to "white" areas and which would cause no interference to existing stations. We will also accept applications for new Class II-A facilities as specified in Section 3.22 of the Rules since, in the Clear Channel Proceeding, we have determined that

[4]

these new assignment would serve the public interest. Finally, the Commission feels that we must continue to accept most applications for Class IV power increases. Approximately 500 authorizations to increase the power of Class IV stations to one kilowatt have been granted to date, and, since the effectiveness of the general plan allowing Class IV power increases is dependent upon all such stations (except those restricted by international considerations) increasing power, it is essential that we continue to accept applications from those stations who have not yet increased power and which are, in many cases, suffering substantial interference from those Class IV stations which have been granted increases.

9. We also note at this time that the Commission's revision of the rules governing allocation in the FM broadcast service is nearing completion. The Commission suggests that potential applicants for facilities inthe crowded standard broadcast band give serious consideration to the greater coverage possibilities provided, both day and night, in the FM band.

10. Since the interim procedures set forth in the appendix hereto relate to matters of practice and procedure before the Commission, proposed rule making in accordance with the provisions of Section 4 of the Administrative Procedure Act is not required. Authority for the adoption of the interim procedures is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

Accordingly, IT IS ORDERED, this 10th day of May, 1962, that

Section 1.354 of the Commission's Rules IS AMENDED as set forth in the attached appendix, effective May 10, 1962.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Acting Secretary

Released: May 10, 1962

NOTE: Rules changes herein will be covered by T.S. I-19.

* Dissenting Statement of Commissioner Hyde

I think this is essentially a substantive policy decision and ought to be the subject of a public notice before decision.

[5]

APPENDIX

Section 1.354 is amended to add the following Note:

§ 1.354 Processing of standard broadcast applications.

* * *

NOTE: Pending the Commission's re-study of the rules pertaining to allocation of standard broadcast facilities, requests for standard broadcast authorizations will be considered as set forth in paragraphs (a) and (b) of this note, notwithstanding any provisions of this chapter to the contrary.

(a) Applications for new standard broadcast stations or for major changes in the facilities of existing stations on the frequencies specified in §§ 3.25, 3.26, and 3.27 of this chapter, will be accepted for filing only when the applications fall within the following categories:

(1) Applications requesting authority to increase power of existing Class IV stations on local channels from 250 watts, not to exceed 1 kilowatt, or, from 100 watts to 250 watts or 500 watts.

(2) Applications for new Class II-A stations specified in § 3.22 of this chapter.

(3) Applications for other facilities, except new 100 watt Class IV

[5]

proposals, where a showing has been submitted to demonstrate that the proposed operation (i) would bring a first interference-free primary service, day or night, to at least 25% of the area or 25% of the population within the proposed interference-free service contour; and (ii) would not cause any objectionable interference to existing stations, and would nd involve prohibited overlap as specified in Section 3.37 of the Rules with existing stations.

(b) Applications for standard broadcast facilities now pending will be processed and acted upon in normal course. Applications for new stations or for major changes in existing stations tendered for filing after May 10, 1962, which are not consistent with the interim criteria, will be returned to the applicant.

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[6]

[Rec'd. July 31, 1962]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D.C.

In re Applications of	
Mighty-Mac Broadcasting Company	File No. BP-15,037
Lake Broadcasters, Inc.	File No. BP_____
Each requesting construction permit for new AM station, St. Ignace, Michigan, 940 KC, daytime only.	

PETITION FOR ACCEPTANCE OF APPLICATION AND WAIVER OF SECTION 1.354

Lake Broadcasters, Inc. respectfully petitions the Commission to accept its above-captioned application for a new standard broadcast station and to waive Section 1.354 of its Rules in this connection. In support thereof, it is shown as follows:

1. On May 10, 1962, the Commission released without notice and without any prior rulemaking procedure, a public notice amending Section 1.354 of its rules. In effect, the Commission stated that it would not accept for filing henceforth any standard broadcast applications for new facilities unless they met certain stringent requirements. (Petitioner's application does not meet these requirements of "white" area, although its proposed coverage area is underserved.) The theory of the new policy was stated to be the necessity of examining the AM allocation policy, particularly in view of the concentration of radio facilities in populous centers already having multiple outlets.

2. As part of its order, the Commission provided, however, that it would continue to process the applications on file as of May 1962, regardless of when they were filed or whether they had already been cut off under existing rules. Among the applications then (and still now) on file was the application of Mighty-Mac Broadcasting Company which requests 940 kc with power of 5 kw at St. Ignace, Michigan (File No. BP-15,037). This application was filed on August 14, 1961 and as of today is No. 57 in the processing line. Under the Commission's rules as they existed as of May 10, 1962, that application would still be subject to competitive filings. However, by virtue of its action of May 10, 1962, taken without notice, the Commission as of that date gave Ashbacker protection to all then pending applications. Thus, this applicant was given a substantive right

to the injury of the instant petitioner who otherwise would be entitled to comparative consideration. Unless Petitioner's application is accepted, it is a party aggrieved by this unlawful amendment of the Commission's rules.

3. Assuming arguendo that the Commission's Public Notice of May 10, 1962 was valid despite lack of notice, nevertheless waiver of Section 1.354 is required here in the public interest. Since petitioner requests the identical facility proposed in an application already on

file as of May 10, 1962, it is evident that the allocation questions involved in the imposition of the AM freeze are not pertinent. The technical question as to whether 940 kc daytime only at St. Ignace, Michigan would be a proper allocation from an allocation standpoint will be considered when the Commission reaches the Mighty-Mac application. The acceptance of petitioner's application will not affect this judgment since petitioner is requesting the identical frequency. Thus, a waiver of Section 1.354 in petitioner's case cannot adversely affect any of the objectives involved in the imposition of the freeze.

4. On the other hand, the public interest will be promoted by acceptance of petitioner's application. It will permit the Commission to judge on a comparative basis the qualifications of the above-captioned applicants so that the Commission can determine for itself which is better qualified. In this connection, it should be noted petitioner's principals are local residents who have broadcast experience in the area and who propose a significant degree of integration. On the other hand, Mighty-Mac's principals are from the Lansing, Michigan area, far removed from the proposed service area, and without any previous broadcast experience there. It certainly would not be in the public interest to permit an "allocations" freeze having no relevance to the factual situation here present to prohibit the Commission from making a comparative determination between applicants requesting the identical frequency.

5. The premises considered, it is respectfully requested that petitioner's application be accepted for filing.

Lake Broadcasters, Inc.

By /s/ Samuel Miller

* * *

July 31, 1962

This is to certify that I have served by mail on July 31, 1962 a copy of the foregoing upon Mighty-Mac Broadcasting Company, 259 W. Grand River Avenue, E. Lansing, Michigan.

/s/ Samuel Miller

[11]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

FCC 62-1052
25490

In the Matter of)
)
Interim Criteria to Govern)
Acceptance of Standard)
Broadcast Applications)
)

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Hyde dissenting and issuing a statement; Commissioner Henry not participating.

The Commission has before it for consideration numerous petitions and letters seeking reconsideration of the Commission's action of May 10, 1962, (FCC 62-516, 23 R.R. 1545) establishing a temporary, limited halt in the acceptance of standard broadcast applications. 1/ In addition, the Commission has before it numerous applications tendered after May 10, 1962, accompanied by petitions or letters requesting reconsideration of the interim criteria. 2/ Since, in many cases, petitions nominally seeking waiver of the rule have challenged its legality, the Commission is considering here all requests for reconsideration or waiver received by June 15, 1962. The various

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1/ A single petitioner, the Federal Communications Bar Association, has also requested that the Commission stay the effectiveness of its order pending decision on the petitions for reconsideration and has requested oral argument before the Commission, en banc. The Commission does not believe that oral argument will materially assist in the resolution of the issues now before us and will deny the request. Moreover, since we have not taken dispositive action with regard to any application conflicting with an application filed by a petitioner herein, we have seen no need to stay the effective date of our Order.

2/ These applications are all inconsistent with the interim criteria and fall into one or more of four major categories:

(a) Applications tendered prior to May 15, 1962, the date copies of the May 10th Report and Order were filed with the Nat-

ional Archives and Record Service and made available for public inspection.

(b) Applications filed on or before May 25, 1962, involving substantial interference with applications listed in the Commission's Public Notice, FCC 62-419, "cut-off list" number 33.

(c) Applications involving substantial interference conflicts with proposals filed on or before May 10, 1962, which proposals have not yet received "cut-off" protection pursuant to Sections 1.354 and 1.106 of the Rules.

(d) Applications not involving substantial interference conflicts with any proposal filed on or before May 10, 1962.

[12]

letters, petitions, responsive pleadings and applications involved are set forth in the Appendix to this Opinion.[3/]

2. The contentions advanced in the various pleadings may be divided into three general groups. In the first group are the various arguments to the effect that the Commission's action was, in whole or in part, unlawful. Secondly, several petitioners contend that, apart from questions of legality, the interim criteria should be modified or changed in one or more respects. Finally, nearly all petitioners contend that, should the Commission leave the interim criteria undisturbed, the rule should be waived in view of particular compelling reasons present in each case. Having considered the contentions advanced, we conclude, as set forth more fully below, that (a) the Commission's action was not unlawful, (b) no justification exists for the requested modifications in the interim criteria and (c) all applications not consistent with the interim criteria must be returned to the applicants.[4/]

LEGALITY OF THE REPORT AND ORDER

3. Petitioners' contentions that the interim criteria are unlawful in whole or in part are, essentially, divisible into three sub-categories. It is claimed, first, that the May 10th Report and Order was not adopted in accordance with applicable statutory law and is therefore wholly ineffective; second, that the effective date of the amended rules was earlier than allowed by law; and, finally, that the amended rules cannot

be made effective as to certain applicants involving conflicts with other applications filed on or before May 10, 1962. The Commission has carefully considered each of the contentions above and has concluded that each must be rejected.

4. The most basic attack mounted against the May 10th Report and Order is the contention that the Commission's action was "substantive" rather than "procedural" and that, therefore, the rule changes could not be effected without full compliance with the formal rulemaking requirements of the Administrative Procedure Act, Section 4. [5/] Except for the statement that certain potential applicants will be denied "Ashbacker rights" -- a

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[3/] One applicant, Cape Canaveral Broadcasters, Inc., has also filed a petition to deny a competing application which was on file prior to May 10, 1962. The Commission will adhere to its usual practice and will consider this petition when the application at which it is directed is considered in normal course.

[4/] One petitioner, Paul E. Taft d/b as Taft Broadcasting Company, has claimed that its tendered application seeks only a "minor change" and, therefore is not barred by the freeze. Examination of the application, which seeks to increase power from one to five kw, indicates that the change sought is a major one. Accordingly, we consider Taft's "contingent" request for waiver herein.

[5/] The Administrative Procedure Act, 5 U.S.C. §1003, sets forth requirements as to notice of proposed rulemaking, procedures for adoption of rules, and the prerequisites to effectiveness of rules so adopted. However §1003(a) specifically exempts "rules of agency. . . procedure and practice" from the notice requirements and §1003(c), dealing with the effective date of newly adopted rules, refers only to "substantive" rules. In our Report and Order of May 10th, we stated that "the interim procedures set forth in the appendix hereto relate to matters of practice and procedure before the Commission. . ."

contention we will discuss separately herein -- no authority has been cited in support of this view. Instead, petitioners assert generally that the Commission's action has "a substantial and important impact" on private and public interests [6/] and dwell at length upon the effect of the

Commission's action on particular applicants, rather than upon the nature of the action itself.

5. It is an inescapable fact that some private interests will be affected by almost any rule change, procedural or substantive. It has been recognized by the U.S. Court of Appeals for the District of Columbia, however, that the effect of a particular rule change on individual parties does not determine the categorization of the action involved. In Radio Cabrillo v. F.C.C. 294 F2d 240 (D.C. Cir. 1961), the Court sustained the Commission's cut-off rule[7/] against an attack similar to that made here, noting specifically that:

> . . .all procedural requirements may and do sometimes affect substantive rights, but this possibility does not make a procedural regulation a substantive one.[8/]

Thus, the effect of a regulation on particular parties is not a reliable guide in determining whether or not the rule is "substantive". It is necessary, instead, to look at the rule itself.

6. Substantive rules are those which change standards of station assignments and procedural rules are those dealing with the method of operation utilized by the Commission in the dispatch of its business. There is, however, no fixed and immutable standard which would allow us to determine, from the bare words of a particular regulation, whether the rule falls within the first category or the second. The determinative factor is the context within which the rule was promulgated and, flowing from this context, the essential purpose of the rule. Viewing the interim criteria in terms of these factors, it is clear that the purpose of the "freeze" was not the establishment of new allocation standards without public participation in rule making but, to the contrary, the creation of conditions under which formal rule making proceedings can be held in an effective, efficient, and meaningful manner. In the Report and Order adopting the interim criteria, we noted explicitly that the deterioration situation in standard broadcast allocations would require a formal rule making proceeding. We also recognized, however, that such a rule making proceeding, possibly of extended duration, could have little meaning

if we continued to allocate new stations under the old rules, thus intensifying the very problems our rule making sought to remedy. In this specific context, the

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6/ FCBA Petition

7/ Sections 1.106, 1.354, and 1.361 of the Commission's Rules

8/ Radio Cabrillo, supra, at 244

Commission concluded that a temporary limited halt in the acceptance of standard broadcast applications was a necessary adjunct to any efficient and effective rule making. We believe the manner in which we chose to meet anticipated problems surrounding our rule making proceeding represented a necessary and proper exercise of our discretion in this area.[9/] Since the interim criteria created no new station assignment standards but were, rather, primarily concerned with the effective functioning of Commission processes, the AM "freeze" was procedural in nature and not subject to the formal rule making requirements of the Administrative Procedure Act.

7. The second major contention advanced by various petitioners and applicants is that, assuming the rule change to be procedural, the rule could not be effective as to any applicant filing prior to publication in the Federal Register.[10/] In support of this view, petitioners cite Section 3 of the Administrative Procedure Act (5 U.S.C. §1002), and the Federal Register Act, 44 U.S.C. §307. Section 3 of the Administrative Procedure Act provides, in relevant part:

> Every agency shall separately state and currently publish in the Federal Register . . . (2) statements of general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available as well as forms and instructions as to the scope or contents of all papers, reports, and examinations; . . . No person shall

in any manner be required to resort to organization or procedure not so published.

The Federal Register Act, 44 U.S.C. §307, states:

> No document required under Section 305(a) of this title to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate original or certified copies of the Document shall have been filed with the Division and a copy made available for public interest as provided in Section 302 of this title.

Petitioners contend that the sections cited above render nugatory the May 10th, 1962, effective date we had assigned the interim criteria and that, accordingly, the earliest possible effective date was May 15, 1962.

9/ The Court of Appeals, in Radio Cabrillo, supra, observed that the Commission's "cut-off" rule had been developed to meet problems created by the Ashbacker doctrine and that "the manner of coping with the difficulty lies within the discretion of the Commission, so long as its solution is reasonable." Radio Cabrillo v. F.C.C. 294 F 2d 240, 244 (D.C. Cir. 1961). Paragraphs 11-14, infra, consider the reasonableness of the freeze as applied to particular applicants.

10/ The Report and Order was filed for publication with the Federal Register at 8:45 a.m., May 15, 1962.

[15]

8. The Commission agrees that publication of the May 10th Report and Order was required under the statutes cited above. We do not agree, however, that publication was a precondition to effectiveness with regard to any of the few applicants who tendered substantially complete applications prior to May 15, 1962. At 3:00 p.m. on May 10, 1962, the Commission made available for distribution at its offices the complete text of the Report and Order adopted earlier that day. In addition, a public notice accompanying the full document summarized the Report and Order and quoted, verbatim, the operative sections of the interim criteria. Each of the applications tendered prior to May 15, 1962, now carries with

it some written indication that the applicant, the applicant's attorney, or both, had read at least the public notice prior to the time the application was tendered for filing. Under these circumstances, the Federal Register Act does not preclude effectiveness as to these applicants since the Act, as quoted above, equates "actual knowledge" with publication as a precondition to effectiveness with regard to a particular party. Nor do we believe that Section 3 of the Administrative Procedure Act requires a different result. The Administrative Procedure Act contains no independent definition of "publication." The purpose of Section 3(a), however, is essentially the same as that underlying the Federal Register Act -- i.e., making information available to the public, particularly in areas where actions of government agencies affect private interests. In light of this essential identity of underlying policy, it appears most reasonable to consider the publication requirements of Section 3(a) of the Administrative Procedure Act as defined by the earlier statutory language contained in Section 307 of the Federal Register Act. Thus read, the actual knowledge of the applicants here involved becomes determinative and they cannot be held to have been required to resort to "unpublished" procedure. See Eastern Air Lines v. Union Trust Company 95 U.S. App. D.C. 189, 221 F2d 62, (D.C. Cir. 1955).

9. A single petitioner, WLOD, Inc., (WLOD) has raised a different argument with regard to the effective date of the interim criteria. WLOD contends that Section 408 of the Communications Act prohibits the Commission from issuing any "order" to be effective in less than thirty days. Section 408, in relevant part, reads as follows:

> Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days after service of the order, and shall continue in force until its further order or for a specified period of time, according as shall be prescribed in the order, unless the same be suspended or modified or set aside by the Commission, or set aside by a court of competent jurisdiction.

WLOD's reliance on Section 408 is mistaken. This Section, as well as Section 407, which must be read concurrently with 408, was incorporated from the Interstate Commerce Act in 1934. The section was, in our opinion, intended to apply

[16]

only to cases in which an order has been directed at a specific party,[11/] and, during the past twenty-eight years, Section 408 has been so applied. The wording of the section itself reinforces this interpretation inasmuch as it bars effectiveness sooner than "thirty days after service of the order." Accordingly, we conclude that Section 408 does not apply to an "order" effecting a change in procedural rules of general applicability.

10. The final challenge to the legality of the freeze order comes from those petitioners tendering applications claimed to be mutually exclusive with other proposals filed prior to May 10, 1962, which latter applications had not yet been afforded "cut-off" protection under previously applicable Commission Rules. These applicants claim that rejection of their proposals will contravene the mandate contained in Section 307(b) of the Communications Act, since the applications now tendered may well represent a more efficient distribution of radio service than mutually exclusive proposals already on file. Moreover, these petitioners contend, failure to accept their applications and consolidate them for hearing with the mutually exclusive proposals on file will deprive the petitioners of "Ashbacker rights."

11. The Commission does not accept these contentions. We have noted earlier that the interim criteria of May 10, 1962 represented procedural rule changes made necessary by a forthcoming standard broadcast rule making proceeding. Since the rule change is a procedural one, the fact that some potential applicants may be substantially affected does not determine the propriety of the action. The real question raised by the group of applicants here considered is whether or not the procedural changes embodied in the interim criteria are reasonable ones. We believe, as set forth more fully below, that the rule changes were reason-

able and that the particular form they assume is necessarily related to the discharge of our statutory obligations.

12. As explained in paragraph 6, supra, the Commission concluded that a meaningful rule making proceeding concerning standard broadcast assignment could not be held if we continued to accept and grant, at the same time, applications which would only aggravate the very problems we were trying to solve. Having reached this initial conclusion, it became necessary to determine the nature and extent of the "freeze" necessary to accomplish our objectives. Upon an analysis of all pending applications, we concluded that the total number of potential grants that could result from proposals on file, (excluding Class IV power increases), was not sufficiently great to frustrate the ends we sought to accomplish through our rule making. We decided, therefore, that we could continue to process applications on file, recognizing the

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11/ Apparently a specific common carrier. Cf Section 407, which complements 408 in certain respects and which specifically applies to "a carrier."

[17]

equitable considerations inherent in those cases, without substantial sacrifice of our basic objectives.12/ At the same time, however, we recognized that any further acceptance of new applications would raise the number of grants to an intolerable level and, accordingly, it was concluded that we must exercise our administrative discretion so as to bar such new applications.13/ It was further concluded that if a freeze were to be put into effect it must be done without delay since, on the basis of past experience, it was expected that any substantial postponement would result in a flood of several hundred hastily prepared applications. Therefore, we amended our procedural rules to establish, in effect, a new "cut-off date" for most pending applications, this new date acting to supersede all previous cut-off lists.

13. Only in this specific context can we properly consider petitioners' arguments based on Section 307(b) of the Communications Act. Section 307(b) requires that "the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." In the standard broadcast service, Section 307(b) has most often been invoked in the past when it has been necessary to choose between competing applications proposing mutually exclusive operations with substantially different service areas. Utilization of 307(b) in this relatively narrow "adjudicatory" sense, however, must not be allowed to obscure the fact that the Commission has an even greater obligation to develop an overall plan under which stations are assigned at any particular time so as to insure a "fair, efficient, and equitable distribution" of facilities.[14/] It

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12/ It is clear that the Commission could have taken an alternative route and simply withheld action on all standard broadcast applications during the pendency of this rule making proceeding. See Harvey Laboratories, Inc. v. F.C.C. United States, 289 F2d 458 (D.C. Cir. 1961), which upheld an extensive, but reasonable delay in acting upon an application owing to the "freezes" occasioned by pending NARBA ratification, the Daytime Skywave proceedings, and the Clear Channel proceedings. The rules under which action was deferred pending completion of the latter two proceedings were adopted as procedural regulations, without notice of rule making. See the Commission's Order of December 4, 1950, 15 F.R. 9065. See also Mesa Microwave Inc. v. F.C.C., 105 U.S. App. 1, 262 F2d 723 (D.C. Cir. 1958).

13/ Several defined categories of applications were excepted from the freeze on the ground that their acceptance could in no way frustrate the objectives we seek to accomplish through our rule making. See the Report and Order adopting the interim criteria, 23 RR 1545, 1547.

14/ It is well settled that the Commission may narrowly limit the range of adjudicatory activities in the allocation field through use of the general rule making powers. See Logansport Broadcasting Corporation v. United States 93 U.S. App. D.C. 342, 210 F2d 24 (D.C. Cir. 1954).

is precisely because we have found an urgent need to re-examine the regulations which produce our overall plan of assignment that it has been necessary to institute a proceeding looking toward revision of the AM rules.

14. Several applicants contend, however, that acceptance of their proposals would not add to deterioration of the AM service since they wish to file proposals mutually exclusive with applications already on file. Thus, these petitioners argue, the total number of possible grants would not be increased. This argument is not borne out by the facts. The petitioners advancing this particular argument have failed to consider the inevitable development of "chains" of interlinking mutually exclusive proposals. The chain problem is far from a fanciful possibility, a fact which must be acknowledged by anyone familiar with recent hearing proceedings involving groups of twenty or more applications spread over wide areas of the country, linked together by interference considerations.[15/] The following examples are illustrative of the type of problem to be anticipated if we were to accept new applications "mutually exclusive" with proposals already on file.

(a) A was on file prior to the freeze and B seeks to file an application after May 10, 1962, for a new facility in a different city but on the same frequency as A. Are A and B mutually exclusive? It is often impossible to determine, prior to hearing, whether two applications for different communities are "mutually exclusive". Many applications resulting in some degree of mutual interference are granted concurrently under our present rules. Thus, it may be impossible to predict, when B tenders his application, whether its acceptance would result in two grants rather than one.

(b) A was on file prior to the freeze. Prior to A's cut-off date, B and C file applications for stations on the same (or adjacent) frequency as A, but in different cities. B and C may prove to be "mutually exclusive" with A but not with each other,

again raising the possibility of mutiple grants where one had been possible before.

(c) A and B, both on file before the freeze, propose mutually exclusive operations in different cities. C, filing after the freeze, proposes a new facility in A's city, but utilizes a different directional antenna pattern (or lower power) so that the C proposal is not mutually exclusive with B's. It is now possible

15/ See, e.g., Community Service Broadcasters, Incorporated, et al, (FCC 61 1204); Saul M. Miller, et. al (FCC 61-1473).

[19]

to grant both C and B, rather than A or B. Thus, even though C has applied for a station in the same city as A, it is still possible to increase the number of potential grants.

(d) A, an applicant filing prior to the freeze, may not possess all requisite qualifications. Acceptance of B's application makes possible a new grant where there would have been none upon denial of A's application, even when B applies for facilities identical to those sought by A.

The examples given above have been reduced to their simplest terms for purposes of illustration. In practice, it is to be expected that these problems would often occur in combination and attain considerable complexity. Confronted with these possibilities, and having decided that we will continue to process applications filed prior to May 10, 1962, the Commission concludes that the only reasonable and effective means of accomplishing our objectives is to bar all applications tendered after May 10th which are not consistent with the interim criteria.

15. The Ashbacker case 16/ has been cited by most petitioners as a further ground compelling acceptance of applications mutually exclusive with proposals on file. We do not believe the case is in point. In Ashbacker, the Supreme Court held that a hearing is required between

two co-pending, mutually exclusive applications and that the Commission's action granting the first of the two applications without hearing must be set aside. It is important to note, however, that Ashbacker was concerned with two applications which were already on file with the Commission. The Supreme Court noted expressly that:

> Apparently no regulation exists which, for orderly administration, requires an application for a frequency previously applied for, to be filed within a certain date.

The recent decision of the U.S. Court of Appeals in Radio Cabrillo v. F.C.C., 294 F2d 240 (D.C. Cir. 1961), demonstrates that when a reasonable regulation establishing a "cut-off" date does exist, no "Ashbacker rights" arise on the part of a late filing applicant. The Commission believes that the regulation adopted on May 10, 1962, was a reasonable one under the circumstances, and a necessary correlative to the forthcoming standard broadcast rule making proceeding.

16. The discussion above is applicable to all parties tendering applications after May 10th, who claim mutual exclusivity with other applications filed before that date. It is necessary to give special consideration, however, to an additional argument advanced by the limited group of petitioners

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16/ Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945).

claiming conflicts with applications on the Commission's "cut-off list" number 33, released April 19, 1962, listing applications ready and available for processing on May 25, 1962, (hereinafter the "May 25th list"). These petitioners assert that the Commission's action changing the effective cut-off date to May 10th was arbitrary, capricious, and contrary to principles set forth by the U. S. Court of Appeals in Ridge Radio Corporation v. F.C.C. 110 U.S. App. D.C. 277, 292 F2d 770 (1961). Several variants of this argument have been submitted: the first to the effect

that the freeze is ineffective as to any applicant filing prior to May 25th, since the cut-off list was, in effect, a representation that the Commission would accept applications until at least that date; the second that the freeze is ineffective as to any applicant having a potential conflict with an an application on the list. (The latter contention is based upon the possibility of the pre-May 25th filing of an application or applications which would act to link a proposal on the list with petitioner's proposal, itself not in conflict with the listed proposal.)

17. This argument may only be evaluated upon a comparison of the problems giving rise to the "cut-off" rule with the circumstances compeling us to impose the present "freeze." The rules establishing the cut-off list procedure were adopted at a time when the Commission's processes were becoming hopelessly clogged with late filing standard broadcast applicants seeking comparative consideration with prior-filed applications pursuant to the Ashbacker doctrine.[17/] The primary purpose of the rules was to enable the Commission to clear the logjam of applications threatening to paralyze our processes, (and not, as petitioners appear to infer, to confer new private rights on potential applicants.) [18/] The present freeze, on the other hand, resulted from an entirely different set of problems which, we believe, are of transcending importance. As we have noted at some length, these problems concern the adequacy of the basic rules under which we discharge our allocations function in the standard broadcast field. In view of the importance of the issues involved, we concluded that we must suspend our normal procedures concerning the acceptance of applications. This action was far from "arbitrary and capricious," but, in the present context, a completely necessary measure directly linked to the discharge of our statutory obligations.

17/ For a discussion of the tremendous processing problems confronting the Commission at the time the cut-off procedure was adopted, see the Report and Order amending Sections 1.106, 1.354, and 1.361 of the Rules, 18 RR 1565 (1959).

18/ In the Report and Order adopting the cut-off procedure we noted specifically that the cut-off date set by public notice was not necessarily the final date upon which a competing application could be filed. We stated:

> "Thus, the date fixed by the Public Notice is no guaranty that an application will be entitled to consideration with listed applications if filed by that date, but rather is the last possible filing date for comparative consideration even if the earliest filed application has not been acted upon by that time. Potential applicants, as in the past, must be guided in their decisions as to filing their applications by the public notices of the acceptance for filing of competing applications and the status of the processing line." 18 RR 1565, 1567

[21]

18. Ridge Radio does not require a different result. In Ridge it was held only that the particular form of a cut-off notice then employed by the Commission was defective, inasmuch as it failed to advise a potential applicant that proposals involving an indirect conflict with a listed application must be filed by that application's cut-off date. No such question is involved in the present case. It is clear that, pursuant to Sections 1.361(c) and 1.354(c) of the Rules, any application listed on the May 25th list could have been granted or designated for hearing on or before May 10, 1962. Since the freeze order was, in effect, an equivalent action, reasonably related to a specific public interest objective, we do not believe that the particular group of petitioners here considered has suffered the loss of any legal right.19/

REQUESTED MODIFICATIONS IN THE INTERIM CRITERIA

19. Several petitioners have submitted alternative requests that the interim criteria be modified to some degree. For the most part, these requests for partial reconsideration seek additional categories of exception for those applications in direct, indirect, or potential conflict with one or more applications on file before the freeze. These requests will be denied for reasons similar to those given in the preceding paragraphs. A single petitioner, Radio Orange County, Inc., has requested

that the interim criteria be modified to permit acceptance of applications for improved facilities by Class II stations operating on Class I-B channels. Radio Orange submits that the Commission's "Further Supplement" to the Clear Channel Decision removed restrictions as to certain applications by Class II stations on I-B channels and constituted an "invitation" to file such applications for much needed improvements in existing facilities. The Commission does not feel that petitioner's position is essentially different than that of most potential applicants. The interim criteria represent a temporary measure to be kept in effect during the pendency of rule making proceedings looking toward revision of the AM rules. Radio Orange, and other potential applicants in the same position, will be able to file its application following conclusion of the rule making proceeding if the application is consistent with the standard broadcast rules then put into effect.

REQUESTS FOR WAIVER

20. Nearly every petitioner tendering an application has submitted a request for waiver of the interim criteria. In general, the requests are based upon one or both of the following reasons:

19/ Our conclusions above would also dispose of the contentions advanced by petitioners claiming potential conflicts with proposals on the May 25th list, or claiming that any application filed prior to May 25th must be accepted. We wish to make it clear, however, that even if we were to accept applications mutually exclusive with May 25th proposals, we would not accept any other applications not involving an actual direct or indirect conflict with a listed application. It is our opinion that petitioners claiming only potential conflicts are in no different position than any other applicant whose arguments for acceptance are in no way based on the May 25th list.

[22]

(a) The petitioner has invested substantial amounts of time and money in the preparation of a tendered application. The application was nearly complete when the freeze went into effect.

(b) The tendered application proposes a much needed service, though not complying with any of the exceptions to the freeze

listed in the interim criteria. Failure to accept the application will result in great hardship in a particular community.

21. We have carefully considered each of the requests for waiver and have concluded that each must be denied. The present freeze rule is one which has as its basis policy considerations of the utmost importance. It is our opinion that these policy considerations are such as to override the usual equities presented as grounds for waiver. A detailed examination of each waiver request considered herein has convinced us that, accepting the various factual allegations of petitioners as true, insufficient grounds have been set forth to justify waiver of the rule in any of the cases herepresented. See United States v. Storer Broadcasting Company, 351 U.S. 192 (1956). We note additionally that the grant of any one of the waiver requests involved here would not be justifiable vis-a-vis most of the others since the factual gradations between the cases are generally small.[20/] To embark upon a wholesale grant of waiver requests would obviously destroy the ends we sought to accomplish in adopting the interim criteria. We feel that what we said in the May 10th Report and Order in connection with the practice of granting individual waivers of Section 3.28(d)(3) of the Rules is equally pertinent here:

> Beyond the exceptions, an ever-increasing number of non-engineering factors has been found to justify waiver of the Rule in individual cases, each of which has been added to the body of precedent that inextricably merges with the Rule itself as it is applied in subsequent cases. The result has been a developing system of assignments that may be justified in terms of each individual case, but which, on the whole, bears little relation to the rational assignment system represented by the protected contour concept in undiluted form.[21/]

In short, insofar as the requests for waiver are based upon the private hardship of the petitioner, we cannot, in view of our overall obligation to serve the public interest, make further exceptions; insofar as the re-

quests are based upon a public need, we feel it necessary to delay fulfillment of that

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20/ In addition to the petitions and letters requesting waiver listed in the attached appendix, numerous additional requests have been received since June 15, 1962 - - the cut-off for petitions considered in this opinion.

21/ 23 RR 1545, 1547. (1962)

need in individual cases so that a better overall plan for assigning standard broadcast stations in the public interest may be devised. We believe that we must consider the totality of our obligations in connection with any requests for waiver and viewing the requests in this perspective, we conclude that each must be denied.

CONCLUSIONS

In view of the foregoing, IT IS ORDERED that the petitions and requests listed in the attached Appendix, which seek reconsideration and/or waiver of the interim criteria adopted May 10, 1962, ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Acting Secretary

Attachment

Adopted: October 10, 1962

Released: October 15, 1962

*See attached dissenting statement of Commissioner Hyde

APPENDIX

A. Petitions for Reconsideration of the Report and Order of May 10, 1962, (FCC-62-516) filed prior to June 16, 1962, and unaccompanied by a tendered application:

(1) Federal Communications Bar Association: "Petition for Reconsideration, Request to Set Aside Action Taken By It and/or To Stay Effectiveness of Its Order, and Request for Oral Argument" Filed May 25, 1962.

(2) Raymond I. Kandel: "Petition for Reconsideration." Filed June 11, 1962.

B. Applications tendered prior to June 16, 1962, which are inconsistent with the Interim Criteria adopted by the Report and Order of May 10, 1962, (FCC-62-516) and which are accompanied by petitions or letters seeking reconsideration and/or waiver of the Interim Criteria:

Key to Symbols:

* Application tendered prior to May 15, 1962.

\+ Claimed that application is mutually exclusive with an application filed prior to May 10, 1962.

++ Claimed that application is mutually exclusive with an application filed prior to May 10, 1962, and listed on Public Notice FCC-62-419, "the May 25th cut-off list."

(1) James D. Brownyard * +

(a) Application for new station at North East, Pennsylvania, tendered May 14, 1962.

(b) Letter, submitted with application, requests acceptance despite non-compliance with interim criteria.

(2) George W. Burwell, et al d/b as Triangle Electronics +

(a) Application for new station at Selma, North Carolina, tendered May 25, 1962.

(b) "Petition of Triangle Electronics for Acceptance of Application for Filing," submitted same date.

(3) Cape Canaveral Broadcasters, Inc. ++

(a) Application for new station at Eau Gallie, Florida, tendered May 25, 2962.

[25]

(b) "Petition for Acceptance of Application for Filing, for Waiver of Section 1.354 and/or Reconsideration of Order Amending said Section, and for Other Relief," submitted same date.

(c) Opposition to petition above, filed June 5, 1962, by R. A. Vaughn and Thomas R. Hanssen, d/b as Vaughn-Hanssen Company.

(d) Reply to Opposition, submitted June 14, 1962, by petitioner.

(4) Capital Broadcasting Corporation

(a) Application for new station at Barnesville, Ohio, tendered May 15, 1962.

(b) "Petition for acceptance of application," submitted same date.

(5) Frederick Eckhardt d/b as Mansfield Broadcasting Company

(a) Application to change frequency of station WCLW, Mansfield, Ohio, tendered June 15, 1962.

(b) Petition requesting reconsideration or waiver of the interim criteria, submitted June 15, 1962.

(6) Gold Sonics Incorporated ++ *

(a) Application for a new standard broadcast station at Midland, Texas, tendered May 11, 1962.

(b) Letter from applicant's attorney requesting reconsideration or waiver of the interim criteria, submitted same date.

(7) Good Music Broadcasting Company

(a) Application requesting increase in power and change in site for Station WKTX, Atlantic Beach, Florida, tendered June 8, 1962.

(b) "Petition for acceptance of application for filing, and waiver of Section 1.354 and/or reconsideration of Order, amending said Section and other relief," submitted same date.

(8) F. K. Graham tr/as Coast Broadcasting Company

(a) Application to increase the daytime power of Station WGOO, Georgetown, South Carolina, tendered June 15, 1962.

(b) "Petition of Coast Broadcasting Company for acceptance of application for filing," submitted same date.

[26]

(9) Arthur Griener and G. W. Winter ++

(a) Application for a new station at Palmyra, Pennsylvania, tendered May 25, 1962.

(b) Letter from applicant requesting waiver of the interim criteria.

(10) Heart of Georgia Broadcasting Company, Inc. +

(a) Application for a new standard broadcast station at Gordon, Georgia, tendered May 17, 1962.

(b) Letter from applicant's attorney requesting reconsideration or waiver of the interim criteria, submitted same date.

(11) Indianola Broadcasting Co.

(a) Application for a new standard broadcast station at Indianola, Mississippi, tendered May 25, 1962.

(b) Letter from applicant's attorney requesting waiver of the interim criteria, submitted same date.

(12) Robert A. Jones and Loyd Burlingham d/b as McHenry County Broadcasting Company.

(a) Application for a new standard broadcast station at Woodstock, Illinois, tendered May 16, 1962.

(b) Letter accompanying application stating intention to file petition for reconsideration, submitted same date.

(c) "Petition for acceptance of application," submitted June 25, 1962.

(13) Joseph J. Kessler tr/as WBXM Broadcasting Company

(a) Application for a new standard broadcast station at Springfield, Virginia, tendered May 25, 1962.

(b) "Petition for acceptance of application," submitted same date.

(c) "Petition for partial reconsideration," submitted June 15, 1962.

[27]

(14) Keyser Broadcasting Corporation ++

(a) Application for a new standard broadcast station at Keyser, West Virginia, tendered May 23, 1962.

(b) Accompanying letter and statement requesting waiver of the interim criteria.

(15) Reuben B. Knight +

(a) Application for a new standard broadcast station at Wichita Falls, Texas, tendered May 18, 1962.

(b) Letter from applicant's attorney requesting waiver of the interim criteria, submitted same date.

(16) L&S Broadcasting Company

(a) Application for a new standard broadcast station at Jacksonville, North Carolina, tendered June 12, 1962.

(b) "Petition to accept application for filing, and for waiver of Rule 1.534," submitted same date.

(17) Meramec Valley Broadcasting Company

(a) Application for a new standard broadcast station at Sullivan, Missouri, tendered June 11, 1962.

(b) "Petition for acceptance of application for filing, for waiver of Section 1.354 and/or reconsideration of order, amending said Section and/or for other relief," submitted same date.

(18) Oconee Broadcasting Co., Inc.

(a) Application to increase power of Station WGOG, Wallahalla, South Carolina, tendered June 13, 1962.

(b) "Petition to accept application for filing," submitted same date.

(19) Platinum Coast Broadcasters Inc. ++

(a) Application for a new standard broadcast station at Eau Gallie, Florida, tendered May 24, 1962.

(b) Letter from applicant's attorney requesting waiver of the interim criteria, submitted same date.

[28]

(c) Opposition to request for waiver, submitted June 5, 1962, by R. A. Vaughn and Thomas Hanssen d/b as Vaughn-Hanssen Company.

(d) Reply to opposition, submitted June 13, 1962.

(20) Portage Broadcasting Company *

(a) Application for a new standard broadcast station at Portage, Michigan, tendered May 14, 1962.

(b) "Petition of Portage Broadcasting Corporation for acceptance of application for filing," submitted same date.

(c) Supplement to petition above, submitted May 17, 1962.

(21) Radio Orange County Inc.

(a) Application for increase in power of Station KEZY, Anaheim, California, tendered May 17, 1962.

(b) "Petition for acceptance of application," submitted same date.

(c) "Petition for partial reconsideration," submitted June 6, 1962.

(22) Radio Rockford Inc.

(a) Application to change site, antenna pattern, and add nighttime operation, tendered May 25, 1962.

(b) Letter from applicant's attorney requesting waiver of the interim criteria, submitted same date.

(23) Seminole Broadcasting Company

(a) Application to increase power and to install directional antenna for Station WSWN, Belle Glade, Florida, tendered June 8, 1962.

(b) "Petition for waiver of Section 1.354 of the Commission's Rules and Regulations, and request for acceptance of application for filing," submitted same date.

(24) Paul E. Taft d/b as Taft Broadcasting Company *

(a) Application to increase power of Station KODA, Houston, Texas, tendered May 14, 1962.

(b) "(Contingent) petition for waiver of Rule 1.354(b)," submitted same date.

[29]

(25) Tri-State Broadcaster's +

(a) Application for new standard broadcast station at Sioux Center, Iowa, tendered June 1, 1962.

(b) "Petition for waiver," submitted same date.

(26) WLOD Inc. +

(a) Application to increase the power of Station WLOD, Pompano Beach, Florida, tendered June 11, 1962.

(b) "Petition for waiver of Section 1.354 of the Rules, and acceptance of application," submitted same date.

DISSENTING STATEMENT OF COMMISSIONER ROSEL H. HYDE

I dissent to the Memorandum Opinion and Order denying the petitions and other requests for reconsideration of the Commission's Report and Order of May 10, 1962 (FCC 62-516) in the matter of "Interim Criteria to Govern Acceptance of Standard Broadcast Applications."

The order of May 10, 1962, was issued without notice of proposed rule making and was made effective the date of issuance, affording no opportunity for consideration of views of interested parties as to the merit of the order and no advance notice as to its effective date. The Order said that the new rules related to matters of practice and procedure and that notice and rule making in accordance with the Administrative Procedure Act were not required.

The petitions to reconsider which have been filed refer, among other matters, to a number of applications which were prepared or were in process of preparation in reliance upon criteria which had been in effect for many years. They represent substantial investments in funds and efforts. However, under the new "interim criteria" they are summarily rejected. Each applicant is told that the rejection is without prejudice to resubmission when the interim criteria are no longer in effect provided the proposal would be consistent with substantive rules then in force. No notice of proposed rule making has been issued looking toward promulgation of such new substantive rules. In the meantime, the Commission will continue to accept and act upon applications which comply with what it terms "interim criteria." Grants thus made may well present engineering obstacles to grants of rejected applications should they later satisfy new rules yet to be devised. The new criteria which the rejected applications failed to meet require in specific terms that new stations with certain exceptions must bring service to relatively underserved areas. This test did not appear in the now superseded rules; it introduces a new standard for allocating new stations. It is substantive in character according to the following definition from para-

graph 6, first sentence of the majority opinion:

> "Substantive rules are those which change standards of allocation and procedural rules are those dealing with the method of operation utilized by the Commission in the dispatch of its business."

The Commission should reconsider its order and comply with the spirit and letter of Section 4 of the Administrative Procedure Act.

FCC 62-1060
24479

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D.C.

* * *

October 10, 1962

Lake Broadcasters, Inc.,
209 Truckey Street
St. Ignace, Michigan

Gentlemen:

Reference is made to your application, tendered July 31, 1962, requesting authority to establish a new standard broadcast station at St. Ignace, Michigan, and to your petition filed concurrently with the application seeking reconsideration or waiver of the interim criteria contained in Section 1.354 of the Commission's Rules.

Insofar as you seek reconsideration of the Commission's Report and Order of May 10, 1962, adopting the interim criteria, and challenge the legality of that action, your petition was not timely filed pursuant to Section 1.191 of the Commission's Rules [now Section 1.84] and Section 405 of the Communications Act of 1934, as amended. It is noted, however that on October 10, 1962, the Commission denied a number of similar petitions for reconsideration involving essentially the same substantive contentions that you have raised in your petition. A copy of the Commission's Memorandum Opinion and Order of October 10, 1962, is enclosed for your information.

In that Opinion, we also considered and denied numerous requests for waiver of the interim criteria. Since the grounds for denial involved general policy considerations and did not turn upon the facts of any particular case, we feel that our reasons there are equally applicable to your own request for waiver and for those reasons, your request will be denied.

Your tendered application is returned herewith as inconsistent with the "NOTE" to Section 1.354 of the Commission's Rules.

BY DIRECTION OF THE COMMISSION

/s/ Ben F. Waple
Acting Secretary

Enclosures:

[32]

[Received November 9, 1962, F.C.C.]

*** LAW OFFICES ***
SAMUEL MILLER
1032 WASHINGTON BUILDING
WASHINGTON 5, D.C.

November 9, 1962

Mr. Ben F. Waple, Acting Secretary
Federal Communications Commission
Washington 25, D. C.

Dear Mr. Waple:

Transmitted herewith is a petition for reconsideration of the Commission's action returning the application of Lake Broadcasters, Inc. for a new standard broadcast station at St. Ignace, Michigan.

The application itself is also resubmitted herewith in triplicate, together with an amendment to the application which you also returned.

Sincerely,
/s/ Mark E. Fields

Enclosure

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[33]

[Received November 9, 1962, F.C.C.]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In re Application of	)
LAKE BROADCASTERS, INC	)
For construction permit for St. Ignace, Michigan, 940 kc, 1 kw, day	)

PETITION FOR RECONSIDERATION

Lake Broadcasters, Inc. respectfully petitions the Commission to reconsider its action of October 10, 1962, returning the above-captioned application to the applicant (FCC 62-1060, 24479) and

denying applicant's Petition for Acceptance of Application and Waiver of Section 1.354, which had been filed with the application on July 31, 1962. In support thereof, the following is shown:

1. Petitioner's application was one of a large number which were returned to the respective applicants as unacceptable for filing, having been filed after May 10, 1962, when the Commission imposed a "freeze" on acceptance of applications for new standard broadcast stations and major changes in facilities, with certain limited exceptions.

2. Grant of this Petitioner's request for waiver and acceptance of this application for filing would not frustrate or impede any of the objectives sought to be achieved by the Commission's Report and Order of May 10, 1962 (23 RR 1545). As pointed out in Petitioner's original petition, its application is mutually exclusive with an earlier-filed application for the same city on the same frequency, also daytime only (Mighty-Mac Broadcasting Company, BP-15037). The application of Mighty-Mac, which was filed August 14, 1961, and is still on file, has not yet been reached for processing. The Mighty-Mac application is listed on the Commission's "cut-off" list, released November 2, as being available for processing on December 11, 1962 (over a month from now).

[34]

Therefore, grant of this petition for reconsideration and acceptance of Petitioner's application for filing could be accomplished before the Mighty-Mac application is reached for processing, with no delay in the Commission's processing procedures.

3. The first objective sought to be attained by the May 10, 1962, Report and Order is a halt to further AM grants until the Commission can complete its contemplated rule-making proceedings to establish new standards for such grants. However, the May 10, 1962, Report and Order did not call a halt to all further AM grants, as was done in the case of the prior FM "freeze". Instead, the Commission announced that it would not accept any more applications

for filing, but would continue to process all applications which were then on file. As the Commission noted in its Order of October 10, 1962, denying petitions for waiver or reconsideration of the May 10, 1962, Order (FCC 62-1052, 25490) it was "concluded that the total number of potential grants that could result from proposals on file... was not sufficiently great to frustrate the ends we sought to accomplish through our rule-making." (Page 6).

4. Since the Commission has concluded that grant of applications which were pending on May 10, 1962, would be permissible, it is obvious that acceptance for filing and subsequent grant of Petitioner's application would not frustrate the Commission's objectives. Since Petitioner's application is mutually exclusive with an earlier-filed application for the same city, same frequency, no allocation considerations would be affected by granting one rather than the other. Neither involves interference with other pending proposals or existing stations of a significant extent. No combination of grant is possible with one application for St. Ignace which would not be equally possible with the other. Under these circumstances, the public is entitled to have the Commission choose between the two applicants for St. Ignace, and award the grant to the applicant which is better qualified, as shown through comparative consideration of the applications. Denial of this choice would serve no allocation purpose, and, therefore, there is no reason to do so.

[35]

5. In the Commission's 13-page Order of October 10, 1962, the situation presented by Petitioner's application is only referred to once, briefly. On Page 9, Paragraph 14(d), the Commission discusses the case of applications filed after May 10 which seek the identical facilities sought by others filed before the magic date. The reason given by the Commission for refusing to accept for filing such later applications seeking identical facilities is that the earlier-filed

applicant may be found to be disqualified. Such a reason cannot provide any valid basis for denying to an applicant all his rights. In its Order on Page 6, the Commission concluded that all grants which could result from applications on file on May 10 would be permissible. It is inconsistent with that determination to say, three pages later, that the Commission is counting on disqualification of some applications filed before May 10 to protect its allocation policy. Furthermore, the Commission could not base its refusal to accept for filing later-filed applications for identical facilities with those filed before May 10 upon the supposition that such earlier-filed applications would be disqualified. Such a supposition has no basis whatsoever in fact, since the earlier-filed applications here concerned have not even been examined by the Commission. Furthermore, disqualification of an applicant is so rare that the Commission could not state as a matter of statistical probability that a substantial number of the earlier-filed applications would be found to be disqualified. Thus, the reason given by the Commission in Paragraph 14(d) of its October 10, 1962, Order must be without support in law or fact. Since that is the only reference in the Order which covers the situation presented by Petitioner's application, it must be concluded that no valid basis existed for refusing to accept Petitioner's application for filing.

6. Refusal to accept Petitioner's application for filing and to consider it on a comparative basis with the Mighty-Mac application, would deprive Lake Broadcasters, Inc. of its rights under the doctrine of Ashbacker Radio Corp. v. FCC, 326 U.S. 327. Since Petitioner's application was tendered for filing before any action has been taken on the

[36]

application of Mighty-Mac, or even before the Mighty-Mac application was available for processing, it is clear that Petitioner is entitled to comparative consideration with that application.

Respectfully submitted,
LAKE BROADCASTERS, INC.
By /s/ Samuel Miller
/s/ Mark E. Fields

* * *

[Certificate of Service]

FCC 63-35
29336

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D. C.

In the Matter of)
)
Applications returned as unacceptable)
for filing under interim criteria)
governing acceptance of standard)
broadcast applications)

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Hyde dissenting.

1. The Commission has before it numerous petitions concerning the interim criteria now governing acceptance of standard broadcast stations. 1/ Each of the petitions but one seeks reconsideration of the Commission's action returning an application the petitioner had filed subsequent to the AM "freeze" and, to the extent return of the application was based on the Commission's Memorandum Opinion and Order of October 10, 1962, reconsideration of that decision is sought. 2/ One petitioner requests only reconsideration of the October 10th opinion, stating that he has not yet filed an application conflicting with the "freeze" rule, but intends to do so. 3/ The various petitions and responsive pleadings are set out in the attached Appendix.

2. We feel that it would serve no useful purpose to repeat the contentions of the various petitioners questioning the legality of the "freeze" or the wisdom of the Commission's action in adopting the type of rule now in force. No arguments have been advanced by the present group of petitioners that were not discussed and disposed of in our opinion of October 10, 1962. For the reasons stated in that opinion, we reaffirm our adherence to the interim criteria in their present form.

3. Most of the petitions considered here contain alternative requests for waiver of the "freeze" rule. Some of the petitioners make their requests here for the first time and others reiterate requests for waiver once denied. Our position with regard to the waiver requests,

too, must remain essentially the same as that taken on our opinion of October 10th. We noted there that factual gradations between the various cases were generally quite small and stated:

> We have carefully considered each of the requests for waiver and have concluded that each must be denied. The present

---

1/ "NOTE" to Section 1.354 of the Commission's Rules, generally referred to as the "AM freeze."

2/ Our opinion of October 10th (FCC 62-1052, 24 R.R. 1540) denied 28 petitions seeking reconsideration of the Commission's action instituting the "freeze" or requesting waiver of the freeze.

3/ Petition of Raymond I. Kandel.

> freeze rule is one which has as its basis policy considerations of the utmost importance. It is our opinion that these policy considerations are such as to override the usual equities presented as grounds for waiver. A detailed examination of each waiver request considered herein has convinced us that, accepting the various factual allegations of petitioners as true, insufficient grounds have been set forth to justify waiver of the rule in any of the cases here presented. See United States v. Storer Broadcasting Company, 351 U.S. 192 (1956).

4. We believe that each of the waiver requests now before us comes within the language quoted above. However, we feel that we should note briefly several new and somewhat inconsistent arguments connected with the waiver requests in the present group of pleadings. Some petitioners appear to feel that, in disposing of a number of requests at the same time, we have failed to consider the merits of each individual case. Other petitions take the opposite tack and, noting that several waivers of the "freeze" have been granted, accuse the Commission of arbitrary action in denying most requests while granting a few others.

[41]

5. Neither of these points is well taken. We must state again that every request for waiver received by the Commission has been considered individually. The vast majority of these requests cite reasons for waiver based on various equities which do not, in our opinion, override the policy considerations upon which the interim criteria are based. For convenience, we have treated many requests of this kind in a single document since our disposition of each has been governed by the same principle. The cases in which we have waived the rule, on the other hand, are very few and fall into three well defined categories: situations in which an existing station may be forced off the air through loss of its transmitter site (The LBJ Co., FCC 62-1164, 24 R.R. 530); cases in which applications are filed for a new station to replace a former station which has, for one reason or another, gone off the air, (e.g., Capital Broadcasting, Inc., FCC 62-1324); and rare cases in which no changes in the basic licensed facilities are involved, (Black Hills Radio, Incorporated, FCC 62-1321, change in specified hours, Tri-County Public Service, Inc., FCC 62-992, 24 R.R. 277, deletion of one city from dual city designation.) These cases are clearly not examples of arbitrary action on the Commission's part but, to the contrary, illustrate the fact that we have fulfilled our obligation to examine carefully the merits of each individual case.

6. Finally, we note that several of the present petitioners have requested that their applications be accepted on a "conditional" basis -- e.g., conditioned upon non-violation of whatever future AM rules are adopted, or conditioned upon a finding that some other conflicting applicant, now on file, be found fully qualified. We do not believe that "conditional" acceptance of applications represents good administrative

[42]

practice and, in fact, we have attempted to eliminate this practice insofar as it has existed in the past. See Public Notice, FCC 61-1286, 22 R.R. 299, discontinuing acceptance of "contingent" AM applications.

The present requests for "conditional" acceptance will be denied.

7. In view of the foregoing, IT IS ORDERED, That the various petitions listed in the attached Appendix ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Acting Secretary

Attachments:

Adopted: January 9, 1963
Released: January 11, 1963

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[43]

APPENDIX

Petitions and responsive pleadings considered in this opinion:

(1) Abbeville Radio, Inc.

(a) "Petition for reconsideration of Commission action returning application of Abbeville Radio, Inc., for change in facilities of Radio Station WARI, Abbeville, Alabama", received November 14, 1962.

(2) Altavista Broadcasting Corporation

(a) Petition, received November 14, 1962, for reconsideration of return of Altavista's application pursuant to Memorandum Opinion and Order of October 10, 1962, (FCC 62-1052).

(3) James D. Brownyard

(a) Petition, received November 13, 1962, for reconsideration of return of application pursuant to Memorandum Opinion and Order of October 10, 1962.

(b) Opposition to the petition submitted November 29, 1962, by Greater Erie Broadcasting Co., Inc.

(4) George W. Burwell, Billy R. Kirby & John S. Townsend d/b as Triangle Electronics

(a) Petition, received November 13, 1962, for reconsideration

of return of application pursuant to Memorandum Opinion and Order of October 10, 1962.

(5) Capital Broadcasting Corporation

(a) Petition, received November 14, 1962, for reconsideration of return of application pursuant to Memorandum Opinion and Order of October 10, 1962.

(6) Arthur Greiner & G. W. Winter

(a) Petition, received November 14, 1962, for reconsideration of return of application, pursuant to Memorandum Opinion and Order of October 10, 1962.

(7) Heart of Georgia Broadcasting Co., Inc.

(a) Petition, received November 14, 1962, for reconsideration of return of application pursuant to Memorandum Opinion and Order of October 10, 1962.

(8) Raymond I. Kandell

(a) Petition for reconsideration of Memorandum Opinion and Order of October 10, 1962. (Petitioner states that he intends to file an application, but has not yet done so.)

(9) KVOR, Inc.

(a) Petition, received November 14, 1962, for reconsideration of return of application.

(10) Lake Broadcasters, Inc.

(a) Petition, received November 9, 1962, for reconsideration and return of application.

(b) Opposition to the petition, submitted November 26, 1962, by Mighty-Mac Broadcasting Company.

(11) Radio Orange County, Inc.

(a) Petition, received November 14, 1962, for reconsideration of action returning application pursuant to the Memorandum Opinion and Order of October 10, 1962.

(12) Paul E. Taft d/b as Taft Broadcasting Co.

(a) Petition submitted, November 14, 1962, for reconsideration of return of application pursuant to Memorandum Opinion and Order of October 10, 1962.

(13) 560 Broadcasting Corporation

(a) Petition received November 7, 1962, for reconsideration of return of application, pursuant to Memorandum Opinion and Order of October 10, 1962.

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[45]

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON 25, D.C.

* * * * *

January 15, 1963

Samuel Miller, Atty.
1032 Washington Bldg.
Washington 5, D. C.

Lake Broadcasters, Inc.
St. Ignace, Michigan

Gentlemen:

Returned herewith is your application tendered for filing November 9, 1963 for construction permit for a new standard boradcast station to be located in St. Ignace, Michigan.

Preliminary examination of your proposal indicates that the application is not consistent with the interim criteria contained in the "NOTE" to Section 1.354 of the Commission's Rules.

On October 10, 1962, the Commission denied various petitions requesting reconsideration or waiver of the interim criteria adopted by Report and Order of May 10, 1962. A copy of the Commission's Memorandum Opinion and Order of October 10, 1962 is enclosed for your information.

Your application is returned without prejudice to its later resubmission when the interim criteria are no longer in effect, provided, of course, that the proposal would be consistent with the substantive rules in force at that time.

Very truly yours,

Ben F. Waple
Acting Secretary

Enclosures
Application & Exhibits (3)
Orders (2)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LAKE BROADCASTERS, INC., Appellant,	)	
v.	)	Case No. 17,595
FEDERAL COMMUNICATIONS COMMISSION, Appellee.	)	

PREHEARING STIPULATION

I. Counsel for Appellant and Appellee hereby stipulate that the issues presented by the above-captioned case are as follows:

1. Did the Commission act arbitrarily and capriciously, and did it deprive appellant of due process of law, when it returned appellant's application without a hearing as provided in Section 309 of the Communications Act?

2. Does the Commission's "freeze" rule, as applied here, violate the doctrine of Ashbacker Radio Corporation v. F.C.C., 326 U.S. 327, that a later application for a frequency

in a particular city is entitled to comparative consideration with an earlier-filed one?

3. Was the Commission's refusal to consider appellant's application on its merits or to consider waiver of the "freeze" when requested, arbitrary and unreasonable in light of the Commission's continued consideration and granting of other applications?

4. Did the Commission commit error in not accepting appellant's application by reason of the Commission's omission to enunciate specific findings of fact and conclusions of law with respect to appellant's assertion that its application was entitled to comparative consideration with BP-15037?

II. Counsel for Appellant and Appellee further stipulate:

1. Appellant will serve and file its brief on or before May 2, 1963, Appellee will serve and file its brief on or before June 3, 1963; and Appellant will serve and file its reply brief, if any, on or before June 17, 1963.

2. The Joint Appendix shall be filed on or before June 17, 1963. References to the record appearing in the various briefs of the parties shall be to the page numbers in the original record certified to this Court in the above-captioned case. In the printing of the Joint Appendix there will be set forth, in addition to the consecutive numbering of the pages of the Joint Appendix, the original record page numbers in bold type and indented in a manner which will render it convenient for the Court to locate the pages referred to in the briefs.

Respectfully submitted,

/s/ Daniel R. Ohlbaum,
Associate General Counsel
Federal Communications Commission

/s/ Mark E. Fields,
Counsel for Appellant
Lake Broadcasters, Inc.

March 19, 1963

BRIEF FOR APPELLANT
LAKE BROADCASTERS, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,595

LAKE BROADCASTERS, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal from Memorandum Opinion and Order
and Letter and Report and Order of
Federal Communications Commission

SAMUEL MILLER

MARK E. FIELDS

1032 Washington Building
Washington 5, D. C.

Attorneys for Appellant
Lake Broadcasters, Inc.

STATEMENT OF QUESTIONS PRESENTED

Counsel for Appellant and Appellee in this case entered into a stipulation approved by Order of this Court agreeing that the questions presented in this case are as follows:

1. Did the Commission act arbitrarily and capriciously, and did it deprive appellant of due process of law, when it returned appellant's application without a hearing as provided in Section 309 of the Communications Act?

2. Does the Commission's "freeze" rule, as applied here, violate the doctrine of Ashbacker Radio Corporation v. F.C.C., 326 U.S. 327, that a later application for a frequency in a particular city is entitled to comparative consideration with an earlier-filed one?

3. Was the Commission's refusal to consider appellant's application on its merits or to consider waiver of the "freeze" when requested, arbitrary and unreasonable in light of the Commission's continued consideration and granting of other applications?

4. Did the Commission commit error in not accepting appellant's application by reason of the Commission's omission to enunciate specific findings of fact and conclusions of law with respect to appellant's assertion that its application was entitled to comparative consideration with BP-15037?

INDEX

TABLE OF AUTHORITIES

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* Cases chiefly relied upon marked by asterisk.

Miscellaneous:

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,595

LAKE BROADCASTERS, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal from Memorandum Opinion and Order
and Letter and Report and Order of
Federal Communications Commission

BRIEF FOR APPELLANT LAKE BROADCASTERS, INC.

JURISDICTIONAL STATEMENT

Appellant, Lake Broadcasters, Inc., seeks reversal of three orders of the Federal Communications Commission (hereinafter referred to as Commission), the first released May 10, 1962 (FCC 62-516; R. 1-5, reported at 23 Pike & Fischer, R.R. 1545), the second a letter of October 10, 1962 (R. 31), and the third released January 11, 1963

(R. 40-44) which resulted in the return and effective denial of the application of Lake Broadcasters, Inc. for a new standard broadcast station at St. Ignace, Michigan, without consideration by the Commission.

This is an appeal from these orders under Section 402(b)(1) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 402(b), and Rule 37 of the Rules of this Court because Lake Broadcasters, Inc. is an ". . . applicant for a construction permit . . . whose application is denied by the Commission," in that, by refusing to accept the application and by returning such application without action, the Commission has effectively denied the application without the hearing required by Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 309. Appellant submits that this Court has jurisdiction fully to review and reverse the order of the Commission hereby appealed from under Section 402(b)(1), supra.

Appellant believes and avers that its appeal is properly within the jurisdiction of this Court under the decisions in Ranger v. F.C.C., 111 U.S. App. D.C. 44, 294 F.2d 240 (1961), and Ridge Radio Corp. v. F.C.C., 110 U.S. App. D.C. 277, 292 F.2d 770 (1961).

STATEMENT OF THE CASE

Sections 1.106(b)(1), 1.354(c) and 1.361(c) of the Commission's Rules, 47 C.F.R. Secs. 1.106(b)(1), 1.354(c) and 1.361(c), contain the provisions regulating the time of filing and the processing of standard broadcast applications at the Federal Communications Commission. Under Sec. 1.354(c), supra, the Commission provides that it will periodically publish in the Federal Register a public notice listing applications which are near the top of the processing line and announcing the date (not less than thirty days after publication) (1) on which the listed applications will be considered available and ready for processing and (2) by which all conflicting applications must be filed in order

to be grouped with any of the listed applications for processing. The date specified in these notices is known as the "cut-off date."

On August 14, 1961, Mighty-Mac Broadcasting Company filed its application for a new standard broadcast station on 940 kc, with power of 5 kilowatts, at St. Ignace, Michigan (R. 6). Under the Commission's procedures for processing standard broadcast applications, the application of Mighty-Mac Broadcasting Company was assigned File No. BP-15,037. It took its place in line for processing. In February 1962, before the Mighty-Mac application had reached the top of the line and been listed on any "cut-off" list, Lake Broadcasters, Inc., a Michigan corporation, was formed by persons interested in filing a competing application for the same frequency at St. Ignace. Unlike Mighty-Mac Broadcasting Company, whose principals all reside in or near Lansing, Michigan, which is located at a considerable distance from St. Ignace, Lake Broadcasters, Inc. included principals who are residents of the St. Ignace area (R. 7). As shown by Exhibit 1, attached to the application, the Articles of the corporation were prepared on February 15, 1962, and were filed with the State of Michigan Corporation and Securities Commission on February 19, 1962. The corporation was formed for the sole purpose of applying for a new standard broadcast station on 940 kc at St. Ignace. While the principals of Lake Broadcasters, Inc. were preparing necessary information for their AM application, on May 16, 1962, without any valid prior notice[1] or prior proceedings, the Commission, with Commissioner Hyde dissenting, adopted and released the first of the orders here complained of (R. 1-5) purporting to prohibit the filing of all standard broadcast applications for an indefinite period, beginning immediately, except in certain very limited circumstances not here present.

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[1] A Public Notice of the Commission released at approximately 3 p.m. on May 10th (Report No. 4188, Mimeo No. 20050) was the first notice had of the partial "freeze" on standard broadcast applications. Potential applicants thus had until the Commission's offices closed at 5:00 o'clock on that day to file complete applications.

The Order amended, without prior notice, Section 1.354 of the Rules by adding to it a Note which imposed the prohibition (see Appendix A hereto). The Order provided, however, that the Commission would continue to process and grant or designate for hearing applications for standard broadcast facilities then pending (R. 3, 5).

The application of Lake Broadcasters was, in fact, tendered for filing on July 31, 1962, together with a petition for acceptance of the application and waiver of the "freeze" order of May 10 (R. 6-7). Lake Broadcasters, Inc. proposes the use of the same frequency as Mighty-Mac in the same city, both applications being for daytime only operation. The Mighty-Mac application requests power of 5 kilowatts, whereas the application of Lake Broadcasters, Inc. is for only 1 kilowatt (R. 6, 33).

By letter dated October 10, 1962, mailed October 16, 1962 (R. 31), the Commission denied the petition filed by Lake Broadcasters, Inc. and returned its application as unacceptable for filing.

On November 2, 1962, the Commission released its "cut-off" list (F.C.C. 62-114), 27 Fed. Reg. 10862, listing the Mighty-Mac application (BP-15,037) as being available for processing on December 11, 1962 (R. 33). The Mighty-Mac application has not yet been granted and is still pending before the Commission.

On November 9, 1962, Lake Broadcasters, Inc. again tendered its application to the Commission, together with a petition requesting reconsideration of the Commission's previous action (R. 32-36). Mighty-Mac Broadcasting Company filed an opposition to the petition for reconsideration (R. 37-39). On January 9, 1963, the Commission adopted its Memorandum Opinion and Order denying the petition for reconsideration (R. 40-44). By letter mailed January 15, 1963, the Commission returned the application itself (R. 45).

Lake Broadcasters, Inc. thereupon filed a notice of appeal under Section 402(b) of the Communications Act of 1934, as amended, supra, on February 7, 1963.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 151, et seq., and the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. Sec. 1.1, et seq., are printed in the Appendix A to this brief (Pages A-1, et seq.).

STATEMENT OF POINTS

1. The Commission violated the unequivocal provisions of its Rules, and without prior notice, arbitrarily and capriciously adopted its Order of May 10, 1962, and by subsequent orders herein appealed from, based on the first unlawful Order, directed that the application of Lake Broadcasters, Inc. for a new standard broadcast station be returned without consideration.

2. The Commission, under all the circumstances before it, was arbitrary and capricious, assuming, arguendo, the validity of the amendment of its Rules by Order of May 10, 1962, in its refusal to waive the provisions of such rule with respect to the application of Lake Broadcasters, Inc.

SUMMARY OF ARGUMENT

Point I

In adopting the Order of May 10, 1962, here appealed from (R. 1-5) without any effective notice to anyone, the Commission arbitrarily and capriciously failed to comply with:

(1) The clear requirements of Sections 308 and 309 of the Communications Act of 1934, as amended, 47 U.S.C. Secs. 308, 309;

(2) Requirements of the Supreme Court decisions in Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945) and F.C.C. v. Allentown Broadcasting Co., 349 U.S. 358 (1955);

(3) The decision of this Court in Ridge Radio Corp. v. F.C.C., 110 U.S. App. D.C. 277, 292 F.2d 770 (1961);

(4) The unequivocal provisions of Secs. 1.106(b)(1), 1.354(c) and 1.361(c) of its own rules, 47 C.F.R. 1.106(b)(1), 1.354(c) and 1.361(c); and

(5) Its own unequivocal explanation of how it processes applications, WMAD, Inc., 23 Pike & Fischer, R.R. 469 (1962).

The Commission on May 10, 1962, adopted its Report and Order (R. 1-5) completely abolishing (with certain limited exceptions not here pertinent) the right of any party to file any applications after that day, despite the fact that numerous applications were in the process of preparation, on which many thousands of dollars had been invested in reliance upon the Commission's processing procedures, and particularly its "cut-off" procedure as laid out in its Rules (see previous paragraph). Such action without notice was patently contrary to the Commission's own rules, the Communications Act of 1934, as amended, and Court decisions. The Order of May 10, 1962, and subsequent orders reaffirming it, must be reversed.

Point II

Assuming, arguendo, that the amendment to the Rules adopted on May 10, 1962, was valid, the circumstances presented by the application of Lake Broadcasters, Inc. warranted a waiver thereof. The Commission was arbitrary and capricious and abused its discretion in failing to grant such waiver without even giving any specific reason therefor.

ARGUMENT

I

The Commission Violated the Provisions of Its Rules, and Without Prior Notice, Arbitrarily and Capriciously Adopted Its Order of May 10, 1962, and by Its Letter of October 10, 1962, Based on the First Unlawful Order, Directed That the Application of Lake Broadcasters, Inc. for a New Standard Broadcast Station be Returned Without Consideration

Lake Broadcasters, Inc. relied upon the provisions of the Commission's Rules, especially Sections 1.106(b)(1) and 1.354(c), in preparing its application, which was directly competitive with the earlier-filed application of Mighty-Mac Broadcasting Company. Of course, Lake Broadcasters, Inc. took the risk that the Mighty-Mac application might involve a conflict with an earlier-filed application, and, therefore, might be pulled out for processing before its own turn was reached. As it turned out, the Mighty-Mac application was never pulled out ahead of turn. It was taken for processing when its number (BP-15,037) was reached. Thus, it became available for processing on December 11, 1962, and has not yet been granted. Relying on the Commission's well-established policies, the principals of Lake Broadcasters, Inc. formed their corporation in order to apply for the first standard broadcast station at St. Ignace, which now has no standard broadcast station. They felt that a local group, which proposed to have all of its principals active in station operation, would constitute a more desirable licensee, from the standpoint of the public interest, than a group composed entirely of persons not residents in the area. In preparing their application, they were relying upon the fact that the Mighty-Mac application would not be reached in its proper turn for processing until sometime late in 1962.

The provisions of the Rules cited above, concerning filing of applications in the standard broadcast band, were adopted pursuant to a

suggestion of the Supreme Court in the Ashbacker case[2] to provide limits on the time within which applications must be filed in order to be considered with conflicting applications. This Court has upheld the validity of the Commission's "cut-off" rules, providing that due notice of such "cut-off" is given. Ridge Radio Corp. v. F.C.C.,110 U.S. App. D.C. 277, 292 F.2d 770 (1961). In addition to its reliance on the provisions of the Commission's Rules, especially Sections 1.106(b)(1) and 1.361(c), 47 C.F.R. Secs. 1.106(b)(1) and 1.361(c), Lake Broadcasters, Inc. was further entitled to rely on the fact that, under Commission practice, the Mighty-Mac application would not be processed until after it attained its "cut-off" date, late in 1962, and hence Lake Broadcasters, Inc. had until then to file its own application.

The foregoing authorities, the Commission's Rules, decisions of this Court, and the Order of the Commission in WMAD, Inc., 23 Pike & Fischer R.R. 469, indicate that the Commission recognizes its statutory responsibility to encourage applicants to file in conflict with other applications, so that a determination can be had as to which applicant is best suited to operate a radio station in the public interest. Potential applicants were led to rely on such policies of the Commission, and then were suddenly told without prior notice, that they could not file conflicting applications by the Order of May 10, 1962 (R. 1-5). Such action is arbitrary and capricious and must be reversed.

In an attempt to justify establishing a new "cut-off date" for all applications as of May 10, the Commission stated in its Order of October 10, denying reconsideration of its May 10th "freeze" order and ordering the return of numerous applications (R. 11-30), that the basis of its decision to prohibit further filings without notice while continuing to process pending applications was as follows: "Upon an analysis of all pending applications, we concluded that the total number of potential grants that could result from proposals on file (excluding Class IV

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[2] Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327, 333 (Footnote 9) (1945).

power increases) was not sufficiently great to frustrate the ends we sought to accomplish through our rule making." (R. 16).

Since both Mighty-Mac and Lake Broadcasters, Inc. propose the use of the same frequency in the same city, daytime only, and since Lake Broadcasters, Inc. proposes lower power (1 kilowatt) than Mighty-Mac, the Commission by considering these two applications comparatively would have only one ". . .potential grant. . .". Thus grant of either application would not ". . . frustrate . . ." the ends sought to be accomplished by the Commission's "freeze." Since both proposals are for non-directional operation, it is obvious that the application of Lake Broadcasters, Inc., since it proposes lower power, could not possibly involve any interference with any other existing stations or pending proposals greater than would be caused by the proposed operation of Mighty-Mac Broadcasting Company. The rejection of the application of Lake Broadcasters, Inc. is demonstrably arbitrary and capricious, and the Commission must be reversed, because it has conceded that with regard to the general policy of the technical rules and the revision thereof which is contemplated, it is of no particular concern whether the Mighty-Mac application or appellant's application is granted. It should be noted that, in its Order of October 10, 1962, in listing types of applications which it was refusing to accept, the Commission listed one hypothetical example which covers the situation presented by this appeal. This example is as follows:

> (d) A, an applicant filing prior to the freeze, may not possess all requisite qualifications. Acceptance of B's application makes possible a new grant where there would have been none upon denial of A's application, even when B applies for facilities identical to those sought by A. (R. 19)

It should be noted that the hypothesis which the Commission is here indulging in is inconsistent with, and is in fact the opposite of, the hypo-

thesis which the Commission used in the same Order (R. 16) when it said "Upon an analysis of all pending applications, we concluded that the total number of potential grants that could result from proposals on file (excluding Class IV power increases) was not sufficiently great to frustrate the ends we sought to accomplish through our rule making. We decided, therefore, that we could continue to process applications on file, recognizing the equitable considerations inherent in those cases without substantial sacrifice of our basic objectives (footnote omitted)."

It was indeed "equitable" for the Commission to continue to process applications already on file. But it was inequitable to refuse to accept for filing applications, then in course of preparation, where such later applications did not offer any possibility of additional grants beyond those contemplated by the earlier-filed applications. This is particularly true when the Commission's long-established procedures had clearly indicated when competing applications could be filed against applications already on file. It is no answer to say that some of the earlier-filed applications might be denied for legal or financial defects, since the Commission admitted (R. 16) that the grant of all applications then on file would be acceptable to it. As a practical matter, the disqualification of applications for legal or financial reasons when their engineering proposal is sound, is so rare that the Commission could not, and did not, rely upon the future disqualification of any fraction or percentage of the applications then on file in promulgating its "freeze" order. The Commission's processes are in disarray when it is forced to rely on inconsistent reasons to justify its actions.

II

Assuming, Arguendo, the Validity of the Order of May 10, 1962, the Commission Was Arbitrary and Capricious Under the Circumstances in Refusing to Waive the Provisions of That Order With Respect to the Application of Lake Broadcasters, Inc.

It should be noted that the Commission has carefully avoided giving any specific reason whatsoever for returning, and refusing to consider, the application of Lake Broadcasters, Inc. It hardly seems sufficient to state, as the Commission did in its orders of October 10, 1962, and January 9, 1963 (R. 22, 40) that the Commission had "carefully considered each of the requests for waiver" and that "policy considerations are such as to override the usual equities presented as grounds for waiver" in each case, without furnishing any evaluation whatsoever of any of the equities presented by the dozens of petitioners who requested waiver. Administrative agencies have a duty to fairly consider any request for waiver which may be presented to them in the proper form, and this duty can hardly be evaded by soothing assurances that there has been a "detailed examination of each waiver request," (R. 41) when the Commission's orders and letters fail to give any clue as to why a particular request for waiver was denied, even though granting the relief requested in a particular petition would not frustrate the Commission's objectives.

Failure to grant the waiver requested by Lake Broadcasters, Inc. gives the prior applicant an undeserved advantage and protects it from a competing and perhaps preferable application which may demonstrate a superior likelihood of serving the public interest. Ashbacker Radio Corp. v. F.C.C., supra. Since the application of Lake Broadcasters, Inc. would not frustrate the objectives sought to be achieved by the Commission in adopting its order of May 10, 1962, it was patently arbitrary and capricious for the Commission to fail to exercise its discretion to waive the Rule and to accept the application of Lake Broadcasters,

Inc. for filing, so that it could be considered in a consolidated hearing with the pending Mighty-Mac application.

CONCLUSION

For all the foregoing reasons, the orders herein appealed from should be reversed, and the case remanded to the Commission with directions to carry out the judgment of this Court, pursuant to the provisions of Section 402(h) of the Communications Act of 1934, as amended, 47 U.S.C. Sec. 402(h), affording Lake Broadcasters, Inc. all the relief which this Court may direct.

Respectfully submitted,

SAMUEL MILLER

MARK E. FIELDS

1032 Washington Building
Washington 5, D. C.

Attorneys for Appellant
Lake Broadcasters, Inc.

APPENDIX

STATUTES AND RULES INVOLVED

The relevant parts of the Statutes and Rules to which references are made in this brief follow:

STATUTES

Communications Act of 1934, As Amended; 47 U.S.C. Sec. 151 et seq.

Sec. 308(a) provides in part as follows:

"The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: . . ."

Sec. 308(b) provides as follows:

"All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee."

Sec. 309(a) provides as follows:

"Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application."

Sec. 309(e) provides in part as follows:

"If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. . . ."

RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION; 47 C.F.R. SEC. 1.1, et seq.

Sec. 1.106 (47 C.F.R. Sec. 1.106) provides in part as follows:

Sec. 1.106 Consolidations.

Sec. 1.106(a)

The Commission, upon motion or upon its own motion, will, where such action will best conduce to the proper dispatch of business and to the ends of justice, consolidate for hearing: (1) Any cases which involve the same applicants or involve substantially the same issues, or (2) any applications which present conflicting claims.

Sec. 1.106(b)(1)

In broadcast cases, no application will be consolidated for hearing with a previously filed application or applications unless such application, or such application as amended if amended so as to require a new file number, is substantially complete and tendered for filing by whichever date is earlier: (i) the close of business on the day preceding the day the previously filed application or one of the previously filed applications is designated for hearing; or (ii) the close of business on the day preceding the day designated by public notice published in the Federal Register as the day any one of the previously filed applications is available and ready for processing.

NOTE: Subdivision (ii) of this subparagraph applies only to standard broadcast applications for new stations or for major changes in the facilities of authorized stations. See also Sec. 1.354(c) and Sec. 1.361(b).

Sec. 1.354 (47 C.F.R. Sec. 1.354) provides in part as follows:

> **Sec. 1.354(c)**
>
> Applications for new stations (except new Class II-A stations) or for major changes in the facilities of authorized stations are processed as nearly as possible in the order in which they are filed. Such applications will be placed in the processing line in numerical sequence, and are drawn by the staff for study, the lowest file number first. Thus, the file number determines the order in which the staff's work is begun on a particular application. There are two exceptions thereto: the Broadcast Bureau is authorized to (1) group together for processing applications which involve interference conflicts where it appears that the applications must be designated for hearing in a consolidated proceeding; and (2) to group together for processing and simultaneous consideration, without designation for hearing, all applications filed by existing Class IV stations requesting an increase in daytime power which involve interlinking interference problems only, regardless of their respective dates of filing. In order that those applications which are entitled to be grouped for processing may be fixed prior to the time processing of the earliest filed application is begun, the Commission will periodically publish in the Federal Register a Public Notice listing applications which are near the top of the processing line and announcing a date (not less than 30 days after publication) on which the listed applications will be considered available and ready for processing and by which all applications excepting those specified in exception (2) in this paragraph must be filed if they are to be grouped with any of the listed applications.

The note to Sec. 1.354 adopted May 10, 1962 (27 Fed. Reg. 4626) provides as follows:

> **NOTE:** Pending the Commission's re-study of the rules pertaining to allocation of standard broadcast facilities, requests for standard broadcast authorization will be considered as set forth in paragraphs (a) and (b) of this note, notwithstanding any provisions of this chapter to the contrary.
>
> (a) Applications for new standard broadcast stations or for major changes in the facilities of existing stations on the frequencies specified in § § 3.25, 3.26, and 3.27 of this chapter, will be accepted for filing only when the applications fall within the following categories:

(1) Applications requesting authority to increase power of existing Class IV stations on local channels from 250 watts, not to exceed 1 kilowatt, or, from 100 watts to 250 watts or 500 watts.

(2) Applications for new Class II-A stations specified in § 3.22 of this chapter.

(3) Applications for other facilities, except new 100 watt Class IV proposals, where a showing has been submitted to demonstrate that the proposed operation (i) would bring a first interference-free primary service, day or night, to at least 25% of the area or 25% of the population within the proposed interference-free service contour; and (ii) would not cause any objectionable interference to existing stations, and would not involve prohibited overlap as specified in § 3.37 of the Rules with existing stations.

(b) Applications for standard broadcast facilities now pending will be processed and acted upon in normal course. Applications for new stations or for major changes in existing stations tendered for filing after May 10, 1962, which are not consistent with the interim criteria, will be returned to the applicant.

Section 1.361 (47 C.F.R. Sec. 1.361) provides in part as follows:

Sec. 1.361(c)

In making its determinations pursuant to the provisions of paragraph (b) of this section, the Commission will not consider any other application, or any other application if amended so as to require a new file number, as being mutually exclusive or in conflict with the application under consideration unless such other application was substantially complete and tendered for filing by whichever date is earlier: (1) The close of business on the day preceding the day on which the Commission takes action with respect to the application under consideration; or (2) the close of business on the day preceding the day designated by public notice in the Federal Register as the day the application under consideration is available and ready for processing.

NOTE: Paragraph (c)(2) of this section applies only to standard broadcast applications for new stations or for major changes in the facilities of authorized stations. See also § § 1.106(b)(1) and 1.354(c) and (h).

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,595

LAKE BROADCASTERS, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

ON APPEAL FROM AN OPINION AND ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION

MAX D. PAGLIN,
General Counsel,

DANIEL R. OHLBAUM,
Associate General Counsel,

ERNEST O. EISENBERG,
Counsel.

Federal Communications Commission
Washington 25, D. C.

STATEMENT OF QUESTIONS PRESENTED

The questions presented in this case were agreed upon in a prehearing stipulation which was approved by Order of this Court on March 20, 1963. These questions are as follows:

1. Did the Commission act arbitrarily and capriciously, and did it deprive appellant of due process of law, when it returned appellant's application without a hearing as provided in Section 309 of the Communications Act?

2. Does the Commission's "freeze" rule, as applied here, violate the doctrine of Ashbacker Radio Corporation v. Federal Communications Commission, 326 U.S. 327, that a later application for a frequency in a particular city is entitled to comparative consideration with an earlier-filed one?

3. Was the Commission's refusal to consider appellant's application on its merits or to consider waiver of the "freeze" when requested, arbitrary and unreasonable in light of the Commission's continued consideration and granting of other applications?

4. Did the Commission commit error in not accepting appellant's application by reason of the Commission's omission to enunciate specific findings of fact and conclusions of law with respect to appellant's assertion that its application was entitled to comparative consideration with BP-15037?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

*Case principally relied upon has been marked with an asterisk

IN THE UNITED STATES COURT OF APPEALS
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No. 17,595

LAKE BROADCASTERS, INC.,
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Appellee.

ON APPEAL FROM AN OPINION AND ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

JURISDICTIONAL STATEMENT

This case involves an appeal under Section 402(b)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 402 (b)(1), by Lake Broadcasters, Inc. (Lake), a Michigan corporation, from the following actions and orders of the Commission:

(1) The Commission's Report and Order of May 10, 1962 (R. 1-5), establishing a general "freeze" (hereinafter referred to as the "freeze" order), subject to certain exceptions, on Commission acceptance of applications for new standard broadcast stations or for major changes in existing stations; (2) the Commission's letter of October 10, 1962 (R. 31), returning Lake's application for a construction permit for a new standard broad-

cast station at St. Ignace, Michigan, and denying Lake's petition for reconsideration or waiver of the interim criteria established in the "freeze" order; (3) the Commission's Memorandum Opinion and Order released January 11, 1963 (R. 40-44), denying Lake's petition for reconsideration; and (4) the Commission's letter order dated January 15, 1963 (R. 45), again returning Lake's application as being inconsistent with the "freeze" order.

It is the Commission's view that this case is properly within the jurisdiction of this Court under the decisions in Ranger v. Federal Communications Commission, 111 U.S. App. D.C. 44, 294 F.2d 240, and Ridge Radio Corp. v. Federal Communications Commission, 110 U.S. App. D.C. 277, 292 F.2d 770.

COUNTERSTATEMENT OF THE CASE

Appellant's Statement of the Case is not complete, and we believe that the following additional presentation will be of assistance to the Court.

The pertinent facts are as follows:

A. The Commission's Report and Order of May 10, 1962.

On May 10, 1962, the Commission released a Report and Order, effective that same day (R. 1-5), in which it amended Section 1.354 of the Commission's Rules (47 CFR 1.354) to establish a temporary, partial "freeze" on the acceptance of applications for new and changed standard broadcast (AM) radio

facilities. The Commission stated that it found it necessary to impose an immediate "freeze" because the tremendous growth in the number of standard broadcast stations from 955 in 1945 to 3,871 in 1962 had created certain problems which called for an immediate re-examination of the standards employed by the Commission in assigning new or changed standard broadcast facilities. An explanation of these problems and of the purposes contemplated by the "freeze" order was set forth in the Commission's recent brief (at pp. 5-9) filed with this Court on May 6, 1963, in the group of consolidated cases headed by the appeal of Joseph J. Kessler, tr/as WBXM Broadcasting Company v. Federal Communications Commission, Case No. 17,363, and is incorporated into this brief by reference.[1/]

The Commission stated that the interim procedures adopted by the "freeze" order related to matters of practice and procedure before the Commission, and that proposed rule making in accordance with the provisions of Section 4 of the Administrative Procedure Act, 5 U.S.C. 1003, was not required.[2/] Commissioner Hyde dissented, stating that he thought the adoption of the interim procedures was "essentially a substantive policy decision and ought to be the subject of a public notice before decision" (R. 4).

1/ A copy of the Commission's brief in the Kessler case, supra, is being served upon the appellant together with this brief.

2/ Section 4 of the Administrative Procedure Act, in pertinent part, is set forth in the Appendix hereto.

The interim "freeze" procedures were incorporated as the following Note to Section 1.354 of the Commission's Rules (47 CFR 1.354):

§ 1.354 Processing of standard broadcast applications.

* * * * *

NOTE: Pending the Commission's re-study of the rules pertaining to allocation of standard broadcast facilities, requests for standard broadcast authorizations will be considered as set forth in paragraphs (a) and (b) of this note, notwithstanding any provisions of this chapter to the contrary.

(a) Applications for new standard broadcast stations or for major changes in the facilities of existing stations on the frequencies specified in §§ 3.25, 3.26, and 3.27 of this chapter, will be accepted for filing only when the applications fall within the following categories:

(1) Applications requesting authority to increase power of existing Class IV stations on local channels from 250 watts, not to exceed 1 kilowatt, or, from 100 watts to 250 watts or 500 watts.

(2) Applications for new Class II-A stations specified in §3.22 of this chapter.

(3) Applications for other facilities, except new 100 watt Class IV proposals, where a showing has been submitted to demonstrate that the proposed operation (i) would bring a first interference-free primary service, day or night, to at least 25% of the area or 25% of the population within the proposed interference-free service contour; and (ii) would not cause any objectionable interference to existing stations, and would not involve prohibited overlap as specified in Section 3.37 of the Rules with existing stations.

(b) Applications for standard broadcast facilities now pending will be processed and acted upon in normal course. Applications for new stations or for major changes in existing stations tendered for filing after May 10, 1962,

which are not consistent with the interim criteria, will be returned to the applicant.

B. Appellant's Tender Of Application.

Following the release of the Commission's Report and Order of May 10, 1962, the Commission received numerous petitions requesting Commission acceptance of applications tendered for filing after the "freeze" (R. 11). Lake filed such a petition on July 31, 1962 (R. 6-7), and submitted an application for a construction permit for a new standard broadcast station to operate at St. Ignace, Michigan, on a frequency of 940 kc, with power of one kilowatt (R. 6, 33). In its petition Lake stated that its application did not meet the interim criteria established by the "freeze" order (R. 6), but that its proposal was competitive with the application of the Mighty-Mac Broadcasting Company (Mighty-Mac), filed on August 14, 1961, for a construction permit for a new standard broadcast station to operate at St. Ignace, Michigan, on a frequency of 940 kc, with power of 5 kilowatts (R. 6). Lake contended that to the extent that the "freeze" order deprived appellant of comparative consideration with the Mighty-Mac application, which as of July 31, 1962 was still on the processing line, the "freeze" order was unlawful (R. 6, 7).

Lake also requested a waiver of the "freeze" order, stating that since it was applying for the identical facilities sought by Mighty-Mac, the allocation questions involved

in the imposition of the "freeze" were not applicable in its case, and that the public interest would be promoted by a comparative consideration of the qualifications of the competing applicants (R. 7).

On October 10, 1962, the Commission returned Lake's application as being inconsistent with the interim criteria established in the Note to Section 1.354 of the Commission's Rules, and advised Lake by letter of the same date (R. 31) that Lake's petition for reconsideration of the "freeze" order had not been timely filed under Section 1.191 of the Commission's Rules (now Section 1.84) and under Section 405 of the Communications Act of 1934, as amended. The Commission pointed out that a number of similar petitions for reconsideration involving essentially the same substantive contentions as those raised by Lake had been timely filed, and that these petitions had been denied by a Memorandum Opinion and Order adopted October 10, 1962 (R. 11-30). A copy of this Memorandum Opinion and Order was addressed to Lake. The Commission also denied Lake's request for waiver of the interim criteria of the "freeze", stating that in its Memorandum Opinion and Order of October 10, 1962 it had considered and denied numerous requests for waiver, and that the reasons there stated were equally applicable to Lake's request for waiver (R. 31).

A detailed statement of the Commission's rationale for the Memorandum Opinion and Order of October 10, 1962,

has been set forth in the Commission's brief (at pp. 21-27) filed with this Court on May 6, 1963, in the group of consolidated cases headed by the appeal of Joseph J. Kessler, tr/as WBXM Broadcasting Company v. Federal Communications Commission, Case No. 17,363, and is incorporated into this brief by reference.

On November 9, 1962, Lake filed a petition for reconsideration of the Commission's action of October 10, 1962 (R. 33-36). Lake again urged that the grant of its request for waiver and acceptance of its application would not frustrate or impede any of the objectives sought to be achieved by the "freeze" order (R. 33). Lake pointed out that the application of Mighty-Mac, with which it sought comparative consideration, had not yet been reached for processing, and was listed on the Commission's cut-off list, released November 2, 1962, 3/ as being available for processing on December 11, 1962, and that the public of St. Ignace was entitled to have the Commission choose between Mighty-Mac and Lake (R. 33-34). Lake asserted that Commission refusal to accept its application and to consider it on a comparative basis with the Mighty-Mac application would deprive

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3/ The Commission's procedure in publishing cut-off lists has been in effect since April 9, 1959, when the Commission amended Section 1.354 of its Rules to institute this practice, and has been recognized by this Court as constituting a valid procedural device to expedite the Commission's processing of applications. Century Broadcasting Corporation v. Federal Communications Commission, --- U.S. App. D.C. ---, 310 F.2d 864; Ranger v. Federal Communications Commission, 111 U.S. App. D.C. 44, 294 F.2d 240.

Lake of its rights under Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (R. 35).

Mighty-Mac filed an opposition to Lake's petition on November 26, 1962 (R. 37-39), stating that Lake was without any equity in requesting a waiver since it knew of the filing of Mighty-Mac's application on August 14, 1961, and then waited almost a full year until July 31, 1962, before it tendered its own application (R. 37).

C. The Commission's Memorandum Opinion And Order Of January 9, 1963.

On January 9, 1963, the Commission, with Commissioner Hyde dissenting, adopted a Memorandum Opinion and Order (R. 40-44), which it released on January 11, 1963, denying numerous petitions and requests, including that of Lake (R. 40, 44), for waiver of the interim criteria adopted by the "freeze" order, and for reconsideration of the Commission's action, based on the Commission's Memorandum Opinion and Order of October 10, 1962 in returning applications filed subsequent to the "freeze" order.

The Commission rejected the contentions of the various petitioners questioning the legality of the "freeze", stating that no arguments had been advanced by these petitioners which were not discussed and disposed of in the Opinion of October 10, 1962 (R. 40). The Commission also denied all requests for waiver of the "freeze," It pointed out that the following language set forth in the Opinion of

October 10, 1962, was applicable (R. 40-41):

> We have carefully considered each of the requests for waiver and have concluded that each must be denied. The present freeze rule is one which has as its basis policy considerations of the utmost importance. It is our opinion that these policy considerations are such as to override the usual equities presented as grounds for waiver. A detailed examination of each waiver request considered herein has convinced us that, accepting the various factual allegations of petitioners as true, insufficient grounds have been set forth to justify waiver of the rule in any of the cases here presented. See United States v. Storer Broadcasting Company, 351 U.S. 192 (1956).

The Commission then stated that every request for waiver had been considered individually, and that the vast majority of these requests cited reasons for waiver which did not in the Commission's opinion override the policy considerations upon which the interim criteria of the "freeze" were based (R. 41). In the Appendix attached to this Memorandum Opinion and Order of January 9, 1963 (R. 43,44), the Commission specifically listed the name of Lake, and stated that Lake's petition, received November 9, 1962, for reconsideration and return of application, was denied (R. 42, 44).

On January 15, 1963, the Commission addressed a letter to Lake's attorney (R. 45), returning Lake's application as being inconsistent with the interim criteria contained in the "freeze" order, and enclosing a copy of the Commission's Memorandum Opinion and Order of October 10, 1962.

SUMMARY OF ARGUMENT

The "freeze" on standard broadcast applications was properly adopted by the Commission and constituted a reasonable exercise of the Commission's procedural powers. Lake's arguments attacking the "freeze" are substantially similar to those which were presented in the consolidated cases headed by the appeal of Joseph J. Kessler, tr/as WBXM Broadcasting Company v. Federal Communications Commission, Case No. 17,363, and the Court is respectfully referred to the Commission's brief in these consolidated cases (pp. 33-60) for a full presentation of the Commission's position.

The Commission acted within its discretion in refusing to waive the "freeze" for Lake. Lake contends that its application was mutually exclusive with the application filed by Mighty Mac, and that acceptance of its application could not frustrate the purpose of the "freeze" since only one potential grant was involved. Lake's contention, however, fails to take into account the fact that an award to Mighty Mac might never be made. The Commission recognized when it imposed the "freeze" that a certain number of pending applications would never materialize into grants, and this was one of the factors which led the Commission to conclude that the total number of potential grants that could result from proposals on file on May 10, 1962, was not sufficiently great to frustrate the purpose of the "freeze". Lake's request for waiver

on the ground of mutual exclusivity with a pending application would, if granted, require waivers for other applicants making similar claims of mutual exclusivity with pending applications, and would open the door to a very large number of new applications (theoretically double the number of those pending on May 10, 1962) which could tend to defeat the purpose of the "freeze" by resulting in a far greater number of new grants than the Commission contemplated.

ARGUMENT

Lake's appeal rests essentially upon two contentions which may be summarized as follows: First, that the Commission violated the provisions of the Communications Act of 1934, the rules issued thereunder, and applicable judicial precedent in adopting the "freeze" order without prior notice; and second, that the Commission was arbitrary and capricious in refusing to waive the provisions of the "freeze" order with respect to Lake's application (Br. 7-12).

The arguments on the first point are substantially similar to those which were presented in the consolidated cases headed by the appeal of Joseph J. Kessler, tr/as WBXM Broadcasting Company v. Federal Communications Commission, Case No. 17,363. We believe that our brief in these consolidated cases (pp. 33-60), to which the Court and the appellant herein are respectfully referred, adequately presents the Commission's position on these matters. Therefore, we will not repeat our argument on this point.

A specific additional comment is warranted with respect to Lake's assertion that the Commission was arbitrary and capricious in refusing to waive the provisions of the "freeze" in Lake's case. Lake urges that because Lake's and Mighty Mac's applications were both for the same frequency in the same community,.and since a grant would be made in any event for a broadcast station to operate at St. Ignace, Michigan, on the

frequency 940 kc, the purpose of the "freeze" could not be frustrated by the Commission's acceptance of Lake's application (Br. 9-11). However, Lake is assuming an award which may never be made.

The Commission explained the necessity for the imposition of the "freeze" in its Report and Order of May 10, 1962, in the following language (R. 3):

> We feel that the first step necessary to permit an undertaking of the magnitude here involved is a partial halt in our acceptance of standard broadcast applications. This step is essential so that we may avoid compounding present difficulties with a continual flow of new assignments based upon existing, possibly inadequate, standards. On the other hand, we believe that procedural fairness requires that we complete processing those applications currently on file, although we take occasion to note, our consideration of these applications must take into account what we have said here and will reflect our desire to avoid unnecessary aggravation of the problems we have discussed.

Subsequently, in the Memorandum Opinion and Order of October 10, 1962, the Commission amplified the above observations by stating (R. 16-17):

> * * * the Commission concluded that a meaningful rule making proceeding concerning standard broadcast assignment could not be held if we continued to accept and grant, at the same time, applications which would only aggravate the very problems we were trying to solve. Having reached this initial conclusion, it became necessary to determine the nature and extent of the "freeze" necessary to accomplish our objectives. Upon an analysis of all pending applications, we concluded that the total number of potential grants that could result from proposals on file, (excluding Class IV power increases), was not sufficiently great to frustrate the ends we sought to accomplish through our rule making. We decided, therefore, that we could continue to process applications on file, recognizing the equitable considerations inherent in those cases, without substantial sacrifice of our

> basic objectives. At the same time, however, we recognized that any further acceptance of new applications would raise the number of grants to an intolerable level and, accordingly, it was concluded that we must exercise our administrative discretion so as to bar such new applications.
> * * *

In estimating the total number of potential grants that could result from proposals on file prior to May 10, 1962, the Commission realized of course that a certain number of these proposals would never materialize into grants. It rejected all requests for waiver which, if granted, could have the effect of increasing the total number of actual awards (R. 18-19, 22). The Commission specifically referred to the situation presented by Lake, giving as an example the following (R. 19):

> A, an applicant filing prior to the freeze, may not possess all requisite qualifications. Acceptance of B's application makes possible a new grant where there would have been none upon denial of A's application, even when B applies for facilities <u>identical</u> to those sought by A.

A grant of Lake's petition for waiver of the "freeze" would have required an exemption from the "freeze" of all post-"freeze" applications seeking the identical locations and frequencies sought by the pending applications filed prior to May 10, 1962. The door would have been opened to a substantial number of additional applications, theoretically doubling the number pending at the time of the "freeze". This

would have substantially increased the probable number of grants. In short, Commission assent to Lake's request for waiver could not have been granted on the simple basis Lake urges.

In its Memorandum Opinion and Order of October 10, 1962, the Commission properly denied all pending requests for waiver of the "freeze", including those similar to Lake's, stating (R. 22):

> We have carefully considered each of the requests for waiver and have concluded that each must be denied. The present freeze rule is one which has as its basis policy considerations of the utmost importance. It is our opinion that these policy considerations are such as to override the usual equities presented as grounds for waiver. A detailed examination of each waiver request considered herein has convinced us that, accepting the various factual allegations of petitioners as true, insufficient grounds have been set forth to justify waiver of the rule in any of the cases here presented. See United States v. Storer Broadcasting Company, 351 U.S. 192 (1956). We note additionally that the grant of any one of the waiver requests involved here would not be justifiable vis-a-vis most of the others since the factual gradations between the cases are generally small. To embark upon a wholesale grant of waiver requests would obviously destroy the ends we sought to accomplish in adopting the interim criteria.* * *

The Commission re-affirmed its position in its Memorandum Opinion and Order of January 9, 1963 (R. 40-44), in which it gave consideration to Lake's petition for waiver, among numerous others, and stated:

> * * * We must state again that every request for waiver received by the Commission has been considered individually. The vast majority of these requests cite reasons for waiver based on various equities which do not, in our opinion, override the policy considerations

> upon which the interim criteria are based. For convenience, we have treated many requests of this kind in a single document since our disposition of each has been governed by the same principle.* * *

In light of the foregoing discussion it is clear that the Commission was correct when it concluded that it could not properly maintain the "freeze" if it granted the requests for waivers, including Lake's, where the applications did not come within the exceptions already provided.[4/] The refusal of the Commission to waive the "freeze" for Lake, based upon the showing made by the appellant, was within the Commission's reasonable discretion.

4/ The Commission recognized certain requests for waivers (R. 41) where an existing station might otherwise be forced off the air through loss of its transmitter site, or where an application was filed for a new station to replace a former station which had gone off the air, or where no changes in the basic licensed facilities were involved.

CONCLUSION

For the foregoing reasons, the Commission's Orders should be affirmed.

Respectfully submitted,

MAX D. PAGLIN,
General Counsel,

DANIEL R. OHLBAUM,
Associate General Counsel,

ERNEST O. EISENBERG,
Counsel.

Federal Communications Commission
Washington 25, D. C.

June 3, 1963

APPENDIX

STATUTES INVOLVED

Administrative Procedure Act, 5 U.S.C. 1001, et seq., as amended

Sec. 4 (5 U.S.C. 1003):

"Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.-

"(a) Notice. - General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the findings and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(b) Procedures. - After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of §§7 and 8 shall apply in place of the provisions of this subsection.

REPLY BRIEF FOR APPELLANT
LAKE BROADCASTERS, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,595

LAKE BROADCASTERS, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal from Memorandum Opinion and Order
and Letter and Report and Order of
Federal Communications Commission

SAMUEL MILLER
MARK E. FIELDS
1032 Washington Building
Washington 5, D. C.

Attorneys for Appellant
Lake Broadcasters, Inc.

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REPLY BRIEF FOR APPELLANT LAKE BROADCASTERS, INC.

SUMMARY OF ARGUMENT

The Commission's denial of waiver in this case rests on the assumption that grant of waiver in such cases, where the applicant applied for the same frequency as an earlier-filed application in the same city with no higher power, would produce a substantial or significant number of additional grants. Such additional grants would occur where the earlier-filed application was defective in some way, but the later-filed one

was in proper form for grant. But the Commission adduces no facts to indicate that this would occur in any significant number of cases. Therefore its denial of waiver rests on mere assertion.

ARGUMENT

The argument contained in the Commission's Brief (pp. 12-16) rests entirely on the premise that an intolerably large number of grants for new stations would result if the Commission were to grant waiver in the circumstances presented by this application. It should be noted that this argument by the Commission does not deal with appellant's request for waiver on its merits. Rather the Commission asserts that even if the argument for waiver were meritorious, it must be denied anyway because of the necessity of forestalling too many new standard broadcast grants.

The Commission, however, did decide to continue processing all standard broadcast applications pending on May 10, 1962. Therefore, in this case, the Commission is forced to argue that the continued processing of those applications pending on May 10, 1962, would not result in too many grants, but consideration of any competing applications for the same cities on the same frequencies would result in too many grants. The Commission attempts to make this argument in its Brief (p. 14). However, the Commission's argument in this regard is remarkable for its vagueness. Nowhere is there any evidence that any substantial number of new grants would materialize from accepting competing applications for the same cities on the same frequencies which would not have materialized by processing only those applications on file on May 10, 1962. This omission of any facts to support the naked assertion that there would be many more grants as a result of comparative proceedings is notable, for the Commission itself possesses the information and expertise with which to supply the relevant facts. Appellant's initial Brief (p. 10) asserted that denial of applications because of disqualification is rare. The Commission's Brief, carefully sidestepping the problem, does not even controvert, much less disprove, this contention.

Thus, the crucial question is this: Whether consideration of competing applications for the same cities on the same frequencies as those previously pending would result in only a few additional grants, thereby not contributing substantially to the crowded condition of the standard broadcast spectrum, or whether such comparative proceedings would lead to a substantial number of additional grants.

The Commission in its Brief (p. 15) asserts that the latter would be the case. However, it is noteworthy that the Commission's orders and letters in this proceeding nowhere assert that any substantial or significant number of additional grants would occur if comparative proceedings were allowed. Thus the assertion that there would be a substantial increase in the number of grants is merely an unsupported assertion made by Commission counsel in their brief, and in no way constitutes a declaration by the Commission based on its expertise or experience, or on any other apparent basis.

On the contrary, judging from the number of appeals before this Court from the Commission's refusal to accept post-May 10, 1962 applications, wherein the appellant (as here) sought to apply for the same frequency in the same city as an earlier-filed applicant, it appears that no large number of new grants would result from grant of waiver in such cases. As of the date of this brief, there have been only two appeals (including this one) wherein the appellant filed for the same frequency and same city as an application filed before May 10, 1962. It is submitted that when the Commission issues an order resting on a premise having no factual basis, the error cannot be remedied by a statement by counsel in a Brief that the premise is factually correct.

It was, therefore, arbitrary for the Commission to deny a request for waiver, meritorious on its face, when the basis for such denial was a supposition not based on any facts either recited by the Commission or generally known to exist. This omission is particularly significant because the matter at issue (the percentage of denials which may be expected to result from a number of applications) is a matter susceptible

of determination by statistical methods and is purely within the knowledge of the Commission. The omission of any assertion that allowing a hearing to competing applications for the same cities on the same frequencies would produce substantially or significantly more grants indicates that denial of waiver here was not necessary to prevent an excessive number of grants during the freeze period. Therefore there was no valid reason for denying waiver.

CONCLUSION

For the foregoing reasons, and the reasons set forth in appellant's initial Brief, the orders herein appealed from should be reversed and the case remanded to the Commission.

Respectfully submitted,

SAMUEL MILLER

MARK E. FIELDS

1032 Washington Building
Washington 5, D. C.

Attorneys for Appellant,
Lake Broadcasters, Inc.